

Montgomery County, Maryland Procurement Regulations

Table of Contents

1. County Procurement System -- General
2. Definitions
3. Administrative Process -- Procurement
4. Source Selection Methods and Contract Types
5. Using Department Responsibilities
6. Contractor Qualifications
7. Minority Owned Business Contracting
8. Contract Payment
9. Bonds and Insurance
10. Contract Cost and Pricing Principles
11. Contract Modifications
12. Contract Termination
13. Claims Outside a Contract
14. Solicitation Protests; Contract Disputes
15. Contract Review Committee (CRC)
16. Ethics
17. Grants
18. Debarment and Suspension

1. COUNTY PROCUREMENT SYSTEM -- GENERAL

1.1 Authority

- 1.1.1 The County Executive is empowered to issue procurement regulations pursuant to Chapter 11B, Montgomery County Code.
- 1.1.2 These regulations may be suspended or waived by the CAO with respect to any procurement action or class of procurement actions, including cooperative purchases, upon a determination and finding setting forth the reasons why the best interests of the County would be served by the waiver. The CRC must review each proposed suspension or waiver, and forward its recommendation to the CAO, prior to the CAO suspending or waiving the regulations. The CAO must identify each suspension or waiver, in writing, and send it to the Director and the County Council within 7 days after the suspension or waiver; the Director must maintain a record of the suspension or waiver notification from the CAO. If the CAO waives the monetary threshold for a formal solicitation to permit an informal solicitation, the Director must:
 - 1.1.2.1 give public notice of the waiver;
 - 1.1.2.2 ensure that the County invites at least 5 potential offerors that the Director knows or reasonably believes can provide the goods, services, or construction the County seeks to submit an offer. If there are fewer than 5 potential offerors, the County must invite each potential offeror to submit an offer;
 - 1.1.2.3 give public notice that any potential offeror may submit an offer in response to the informal solicitation. The public notice must describe how the potential offeror may submit an offer; and
 - 1.1.2.4 give public notice of the proposed contract awardee.
- 1.1.3 The CAO may adjust by increasing or decreasing the monetary thresholds established in these regulations to reflect changes in the consumer price index for the Washington-Baltimore metropolitan area. The CAO must give public notice of any change in a monetary threshold. Public notice may be given through the Montgomery County Register. The Director must issue revised pages to the regulations to reflect any modifications to these thresholds. The change becomes effective when public notice is given.

- 1.1.4 These regulations are issued pursuant to the requirements of law under Chapter 11B of the County Code.

1.2 Applicability

- 1.2.1 These regulations are applicable to all County departments and agencies and other public entities subject to the purchasing laws of the County, including the County Council, the County Board of Supervisors of Elections, the State Attorney's Office, the Sheriff's Office, the County Board of License Commissioners, and the Circuit Court (not including the Office of the Clerk of the Court).
- 1.2.2 Where Montgomery County engages in a cooperative purchasing venture with or on behalf of another entity, these regulations may be applicable by agreement.
- 1.2.3 These regulations are not applicable to real property transactions, including land purchases, land dispositions, leases, licenses, easements, and rights of entry.
- 1.2.4 The procurement regulations in effect before the effective date of these regulations continue to govern:
 - 1.2.4.1 the solicitation phase of a procurement if the solicitation was issued before the effective date of these regulations;
 - 1.2.4.2 a solicitation protest or appeal if the protest was filed before the effective date of these regulations;
 - 1.2.4.3 a contract dispute arising from an original contract awarded by the County before the effective date of these regulations.

1.3 Administration - Legal Review of Contracts

The Office of the County Attorney is responsible for the review of contract actions for legality and conformance with the Montgomery County procurement regulations to the extent that such review is deemed appropriate by the County Attorney.

1.4 Procurement Authority; Delegation of Authority

- 1.4.1 Authority to acquire goods, services, and construction is vested in the CAO and, by these regulations, is delegated, subject to revision by the CAO, to

the Director. These contracting officers, and only these contracting officers, may delegate, or redelegate, in writing, this authority, subject to limits stated in the delegation. Contracts may be executed on behalf of the County by these contracting officers only, except as otherwise provided in these regulations.

- 1.4.2 No contract may be entered into unless the contracting officer ensures that all requirements of procurement laws, Executive Orders, regulations, and all other applicable procedures have been met.
- 1.4.3 The CAO delegates, subject to revision by the CAO, authority to the CRC to carry out all responsibilities assigned that committee pursuant to law or these regulations.
- 1.4.4 Unless expressly prohibited by law, any procurement authority may be delegated and subdelegated if the delegation is in writing. A delegation may be limited or made subject to conditions. Responsibility for a procurement action, however, may not be delegated.

1.5 Using Department Responsibilities

- 1.5.1 In general, Using Departments are responsible for compliance with applicable laws and regulations, including these regulations and obtaining any required approval.
- 1.5.2 The Using Department must provide information as requested by the Director or the County Attorney for appropriate investigation and remedial action.

1.6 Rules of Construction

- 1.6.1 Where there is a conflict between provisions of these regulations, the provisions of the more specific section control the provisions of the general section.
- 1.6.2 All contracts must be construed with the presumption that the contract complies fully with the provisions of these regulations and as if these regulations were incorporated into the contract.
- 1.6.3 Where these regulations conflict with provisions of a contract, County procurement procedures, directives, policies, or other matters pertaining to procurement, these regulations control. Otherwise, if a conflict can be

resolved by interpretation, the provisions are to be interpreted in a way consistent with each other.

1.7 Appendices

- 1.7.1 These regulations may contain appendices which contain mandatory clauses. The appendices are not part of these regulations and may be updated from time to time by the Office of the County Attorney.
- 1.7.2 The Director must be notified by the Office of the County Attorney of any changes to the appendices. The Director is responsible for prompt distribution of the changes to the Using Departments.

1.8 Procurement Manual

The CAO should issue a Procurement Manual to provide internal procedures to County employees and officials to follow in making a procurement. The manual is not part of these regulations. A violation of a procedure in the manual is not a basis for an offeror or contractor to challenge a procurement action by the County.

2. DEFINITIONS

- 2.1 The words defined in this section have the meaning set forth below whenever they appear, unless:
 - 2.1.1 The context in which they are used clearly requires a different meaning; or
 - 2.1.2 A different definition is prescribed for a particular section of the regulations.
- 2.2 Any definition for words contained in this section is to be construed in a manner that is consistent with and supplementary to any definition contained in Chapter 11B, Montgomery County Code.
- 2.3 These definitions contain substantive material. These defined terms must be interpreted to include all the substantive provisions contained in the definition.

2.4 TERMS AND DEFINITIONS

- 2.4.1 **ACCEPTANCE OF GOODS OR SERVICES:** Acceptance constitutes a determination by an authorized government official that goods or services conforming to the requirements of a contract have been furnished by a contractor. With respect to goods, acceptance is deemed to occur if, after a reasonable opportunity to inspect the goods, an effective rejection is not made within a commercially reasonable time. Acceptance of goods may be revoked where: there is an acceptance on a reasonable assumption that a non-conformity would be cured and it is not later timely cured; or acceptance has taken place without discovery of a non-conformity where the acceptance was induced either by the difficulty of discovery before acceptance of the non-conformity or by the contractor's assurances with respect to conformity of the goods. Revocation of acceptance must occur within a reasonable time after the government official discovers or should have discovered the grounds for it.
- 2.4.2 **ACCEPTANCE OF OFFER:** The communication of acceptance of an offer must be made within the time specified for acceptance in the solicitation or authorized extension in order for the acceptance to be binding on the offeror; however, a communication of an acceptance of an offer made after the time specified in the solicitation may be accepted by an offeror. In order for acceptance to become binding on the County, a fully executed contract must be delivered.

- 2.4.3 **ADVANCE PAYMENT:** A payment to the contractor prior to performance of the work for which the payment is made.
- 2.4.4 **ASSIGNMENT:** The transfer of a contract right or obligation by a contractor to another party. A payment assignment is the assignment of a right to payment under a contract to a party designated by the contractor who has a right to that payment. A performance assignment is the assignment by a prime contractor to a third party of the obligation to perform a prime contract in accordance with its terms and conditions. Assignments must be made through a contract modification and specifically accepted and approved by the contracting officer in order to be effective. An assignment, unless it specifically provides otherwise, does not relieve the prime contractor of its obligations to the County.
- 2.4.5 **AUTHORIZED GOVERNMENT OFFICIAL:** A person granted specific authority to do a particular act by law, by delegation of authority, by official job description, by the law of agency or pursuant to contract provisions.
- 2.4.6 **AWARD:** The delivery of a fully executed contract to an offeror. This delivery may be accomplished by depositing the contract in the mail, with a common carrier, courier service, or delivering it by hand to the offeror, or notifying the offeror by phone, telegram or other means which communicates the award to the offeror and place for obtaining the contract.
- 2.4.7 **BID:** An offer to furnish goods, services, or construction in conformity with the specifications, delivery terms and conditions, and other requirements included in an invitation for bids or other solicitation of a bid.
- 2.4.8 **BID BOND:** An undertaking, in a form satisfactory to the County, by which a third party agrees to be liable to pay the County a certain amount of money in the event a bidder fails to sign a contract as bid.
- 2.4.9 **BID SECURITY:** A cashier's check, certified check, bank letter of credit, or bid bond, deposited with, and at the request of, the County, to guarantee that the bidder will, if selected, sign the contract as bid or mutually agreed, upon presentation of that contract to the bidder. If the bidder does not sign the contract as bid, the deposit may be retained by the County.
- 2.4.10 **BIDDER:** An Offeror.

- 2.4.11 **BIDDER'S LIST:** A current file of vendors and other sources for various categories of goods, services, or construction purchased by the County and maintained and used by the Director.
- 2.4.12 **CAO:** The Chief Administrative Officer for Montgomery County.
- 2.4.13 **CERTIFICATION OF FUNDS:** A written or electronic certification by the Director of Finance that funds are available to pay the cost of a specific contract or the cost of the first period of a multi-term contract, as required by Chapter 11B, Montgomery County Code.
- 2.4.14 **CHANGE ORDER:** A type of contract modification authorized by the contracting officer directing the contractor to make changes within the scope of the contract, pursuant to contract provisions for such changes, with or without the consent of the contractor.
- 2.4.15 **COMPETITION:** The process by which more than one valid source of supply for goods, services, or construction is solicited.
- 2.4.16 **COMPETITIVE NEGOTIATION:** A process by which the County and one or more prospective suppliers communicate successive respective positions with respect to price, specifications, and other relevant terms and conditions in order to arrive at a contract for procurement of goods, services, or construction.
- 2.4.17 **CONFIDENTIAL INFORMATION:** Any information that is not a matter of public knowledge or available to the public on request.
- 2.4.18 **CONSTRUCTION:** The process of building, altering, repairing, improving, or demolishing any structure or building, or other improvements of any kind to any real property. Construction does not include the routine operation, repair, or maintenance of existing structures, buildings, or real property.
- 2.4.19 **CONTRACT:** Any agreement to which the County is a party for the procurement or disposal of goods, services, or construction, including any contract modification. Unless specifically prohibited by Chapter 11B, contract types include: fixed-price, cost, cost-plus-a-fixed-fee, cost reimbursement or incentive. Contracts may provide for the issuance of job orders, task orders, or task letters. Contracts also include letter contracts, grants, and purchase orders. All contracts must be in writing unless

otherwise authorized by these regulations. A contract must include mandatory clauses.

- 2.4.20 **CONTRACT ADMINISTRATOR:** An authorized government official responsible for administering a contract.
- 2.4.21 **CONTRACT AMENDMENT:** A type of contract modification signed by the contractor and the contracting officer that provides for a change of contract provisions, including additional work outside the scope of the original contract.
- 2.4.22 **CONTRACT MODIFICATION:** Any documented alteration in the specifications, delivery, contract period, price, quantity, or other contract provisions of any existing contract, whether accomplished by unilateral action in accordance with a contract provision or by mutual action of the parties to the contract. It also includes administrative changes, notices of termination, field orders, and notices of exercise of a contract option and contract extensions. Unless expressly authorized by contract and these regulations, a contract modification must be written if the contract to be modified is written.
- 2.4.23 **CONTRACT REVIEW COMMITTEE (CRC):** A standing committee established for purposes specified in law or these regulations.
- 2.4.24 **CONTRACTING OFFICER:** The CAO, Director, others delegated by these officials to act within their authority, and other officials specifically authorized by these regulations to enter into a contract on behalf of the County. Only contracting officers may execute contracts or contract modifications on behalf of the County.
- 2.4.25 **CONTRACTOR:** Any person obligated by contract under the County procurement law, to provide goods, services, or construction to the County.
- 2.4.26 **COOPERATIVE PURCHASING:** The combining of requirements of two or more public entities to obtain the benefits of volume purchases, reduction in administrative expenses, or some other public purpose.
- 2.4.27 **COST ANALYSIS:** The review and evaluation of the separate cost elements and proposed profit of an offeror's or contractor's cost or pricing data and an offeror's or contractor's assumptions and judgments in estimating costs.

- 2.4.28 **COST OR PRICING DATA:** All facts as of the time of price agreement that buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental, and are independently verifiable.
- 2.4.29 **COST REIMBURSEMENT CONTRACT:** A contract under which a contractor is reimbursed for costs that are allowable, and a fee, if any.
- 2.4.30 **COUNTY:** Montgomery County, Maryland, a body corporate and politic and a local subdivision of the State of Maryland.
- 2.4.31 **COUNTY DEPARTMENT, OFFICE, AND/OR AGENCY:** An officially designated unit of the County (including the County Council) subject to the procurement law and regulations of Montgomery County, and certain entities required or allowed to follow County procurement law; including the County Board of Supervisors of Elections, the State Attorney's Office, the Sheriff's Office, the County Board of License Commissioners, and the Circuit Court (not including the Office of Clerk of the Court).
- 2.4.32 **CRC:** The Contract Review Committee
- 2.4.33 **DEBARMENT:** A disqualification of a potential offeror from participating in the procurement process, including being awarded contracts, during a pre-determined period of time.
- 2.4.34 **DELIVERY ORDER:** A document or other action which initiates a delivery of goods, services, or construction authorized by a contracting officer or other authorized government official, under an existing contract that establishes terms, price and source of supply.
- 2.4.35 **DETERMINATION AND FINDING:** A document prepared by an authorized government official that states the facts and reasons for a particular decision.
- 2.4.36 **DIRECT PURCHASE:** An informal procurement of goods, services, or construction under the direct authority of the Using Department Head. Competition should be preserved with this method to the extent practical. Contracting with MFD firms is encouraged.
- 2.4.37 **DIRECTOR:** Director of the Office of Procurement.

- 2.4.38 **DISPUTE:** A timely complaint filed by a contractor disagreeing with a decision made by an authorized government official regarding a contract.
- 2.4.39 **EMERGENCY:** Any dangerous condition or unforeseen curtailment, diminution or termination of an essential service which poses an immediate danger to health, life or property.
- 2.4.40 **EMERGENCY PROCUREMENT:** An emergency procurement is an informal procurement of goods, construction, or services required as a result of an emergency.
- 2.4.41 **ENCUMBRANCE:** The recorded reservation of appropriated funds to provide for payment of County contract obligations, which reduces remaining spending authority under an appropriation by that amount. A certification of funds from the Department of Finance constitutes sufficient evidence that there is a sufficient unencumbered balance in an appropriation to cover the County's contract obligations, or the County's obligations under the first period of a multi-term contract, as required by Chapter 11B, Montgomery County Code.
- 2.4.42 **EQUAL ("OR EQUAL"):** Substitute products of similar or superior function, purpose, design, or performance characteristics.
- 2.4.43 **EVALUATION CRITERIA:** Standards, factors, or elements set forth in a solicitation document that specify the basis for evaluation of the solicitation.
- 2.4.44 **FIELD ORDER:** A limited and specific written order usually used in construction contract situations where the authority to direct timely limited change to contract work has been specifically delegated by the contract to the authorized government official at the place of performance.
- 2.4.45 **FIXED PRICE CONTRACT:** A contract that provides for a firm price under which a contractor bears the full responsibility for profit or loss. This does not include a cost reimbursement contract.
- 2.4.46 **FORMAL SOLICITATION:** Invitation for Bid, Request for Proposals and Request for Expressions of Interest.
- 2.4.47 **GOODS:** All supplies, equipment, materials, and all property, except real property.

- 2.4.48 **GOVERNMENT:** Government of Montgomery County, Maryland, unless the context indicates otherwise.
- 2.4.49 **GRANT:** An action by a public or private entity which directs funds on a non-competitive basis to a specific entity. A grant must be implemented by a contract.
- 2.4.50 **INFORMAL SOLICITATION:** Any solicitation that is accomplished without a formal solicitation.
- 2.4.51 **INSPECTION:** Examination and testing of goods, services, and construction to determine whether they conform to contract requirements. Inspection does not constitute acceptance.
- 2.4.52 **INVITATION FOR BIDS (IFB):** A formal solicitation in which competitive sealed bids are invited through a public notice procedure requiring that bids be received by a specified time, opened publicly, and are evaluated solely in terms of responsiveness, price, and bidder responsibility.
- 2.4.53 **LABOR AND MATERIAL BOND:** See Payment Bond.
- 2.4.54 **LATE RESPONSE:** A response to a formal solicitation received at the place designated in the solicitation after the deadline established by the solicitation.
- 2.4.55 **LIQUIDATED DAMAGES:** A sum agreed to in the contract to be paid as ascertained damages by the party who breaches the contract, and not as a penalty, where actual damages may be difficult to determine at the time of the breach.
- 2.4.56 **MANDATORY CLAUSES:** Clauses prepared by the Office of the County Attorney that must be used in solicitations and contracts unless explicitly waived by the Office of the County Attorney.
- 2.4.57 **MANDATORY IFB REQUIREMENTS:** Specific requirements that may not be waived.
- 2.4.58 **MINI-CONTRACT:** A contract valued within certain monetary thresholds for professional services, and under special circumstances, non-professional services, goods, or construction.

- 2.4.59 **MINOR IRREGULARITY:** A failure to meet a requirement in a solicitation that is merely a matter of form (not substance) or is an immaterial or inconsequential provision in the solicitation. The Director may determine the defect or variation in the bid to be immaterial or inconsequential when the significance of the defect or variation as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement.
- 2.4.60 **MINORITY OWNED BUSINESS (MFD):** Minority owned business as defined in Chapter 11B of the County Code.
- 2.4.61 **MINORITY CONTRACTING:** Montgomery County contracting policies and procedures in accordance with the provisions of Chapter 11B of the County Code.
- 2.4.62 **MINORITY PERSON:** A member of a socially or economically disadvantaged group which includes African Americans, Hispanic Americans, Native Americans, Asian Americans, women, and persons with a disability as defined in Chapter 11B of the County Code.
- 2.4.63 **MULTIPLE AWARD:** The award of separate contracts to two or more offerors for the same or related goods or services in situations where the award of a single contract would be impractical or would not meet the total County requirements.
- 2.4.64 **NOTICE TO PROCEED:** A written notice to the contractor issued by an authorized government official directing commencement of contract performance.
- 2.4.65 **OFFER:** A timely response to a solicitation that is binding upon the offeror during the period of time in which the offer is to remain open under the solicitation. An offer is not binding on the County until the award of a contract. An offer also includes a non-binding response to an REOI.
- 2.4.66 **OFFEROR:** A person that makes an offer in response to a solicitation or makes an unsolicited proposal.
- 2.4.67 **PAYMENT BOND:** A bond issued by a surety that guarantees payment to suppliers and subcontractors of a prime contractor.
- 2.4.68 **PERFORMANCE BOND:** A bond issued by a surety that guarantees full performance of a contract by a contractor.

- 2.4.69 **PERSON:** Means any business, individual, union, committee, club, organization, group of individuals, firm, association, corporation, partnership (of any kind), sole proprietorship, limited liability company, or other entity.
- 2.4.70 **PRE-BID/PRE-PROPOSAL CONFERENCE:** An optional meeting open to all prospective offerors prior to submittal of bids or proposals to discuss matters germane to the solicitation.
- 2.4.71 **PRICE ANALYSIS:** An analysis used to determine that a price submitted by an offeror is fair and reasonable.
- 2.4.72 **PROCUREMENT:** Buying, purchasing, leasing, or otherwise acquiring any goods, services, or construction. It also includes all functions that pertain to the obtaining of any goods, service, or construction, including description of requirements, selection and solicitation of sources, evaluation of offers, preparation and award of contract, dispute and claim resolution and all phases of contract administration.
- 2.4.73 **PROFESSIONAL SERVICES:** The services of attorneys, physicians, architects, engineers, consultants, and other recognized professional individuals, associations, corporations, and groups whose services are customarily negotiated because of the individuality of those services and level of expertise involved.
- 2.4.74 **PROPOSAL:** An offer binding on the offeror in response to an RFP and non-binding in response to an REOI.
- 2.4.75 **PROPOSED AWARD:** A decision of the Director that a specific offeror is the successful offeror. This decision must be made in accordance with these regulations and initiates the process by which an award may be made to the offeror. A proposed award is not binding on the County.
- 2.4.76 **PROTEST:** A timely-filed challenge by an aggrieved offeror in connection with a decision regarding a formal solicitation in accordance with Section 11B-36 of the Montgomery County Code and these regulations. A protest must be filed, in writing, with the Director.
- 2.4.77 **PUBLIC ENTITY:** (1) the federal government; (2) a state government and any of its agencies; (3) any political subdivision of a state government and any of its agencies; (4) any board, commission, or committee established by federal, state, or local law; (5) any organization or association of the

federal government, state governments, or political subdivisions of state governments; and (6) any other entity that is: (A) qualified as a non-taxable corporation under the United States Internal Revenue Code, as amended; and (B) incorporated by an entity under paragraphs (1) through (5) for the exclusive purpose of supporting or benefitting an entity under paragraphs (1) through (5).

- 2.4.78 **PUBLIC NOTICE:** Posting information for public inspection during regular business hours. In addition, public notice may, as determined by the Director, also include other means reasonably calculated to notify the public and promote adequate competition, such as advertisement, mailings, placing notices in newsletters , and inclusion of public notice on the RAPID system or other electronic media determined by the Director.
- 2.4.79 **QUALIFICATION AND SELECTION COMMITTEE (QSC):** A committee established by a Using Department for the purpose of evaluating responses submitted by offerors in connection with an RFP or an REOI. Each member of the QSC must be an employee of a public entity, unless specific authorization is obtained from the CAO for another to serve on the committee. Unless otherwise provided in these regulations, the committee must be composed of an odd number of members and must have at least three members.
- 2.4.80 **REQUEST FOR EXPRESSIONS OF INTEREST (REOI):** A solicitation to prospective offerors, the response to which is to be analyzed in accordance with evaluation criteria set forth in the solicitation. The REOI is used to develop a shortlist of prospective offerors who are eligible to receive a subsequent solicitation such as an RFP or an IFB. Requests for Expressions of Interest are generally made where specifications cannot be prepared or the availability of vendors for the goods, services, or construction involved is uncertain or unknown.
- 2.4.81 **REQUEST FOR PROPOSALS (RFP) - BEST VALUE PROCUREMENT:** A solicitation to prospective offerors, the response to which is analyzed in accordance with evaluation criteria set forth in the solicitation for the purpose of ranking the proposals received in order to obtain the best value for the County.
- 2.4.82 **REQUIREMENTS CONTRACT:** A contract for goods, services, or construction covering long-term requirements (usually twelve months or more), used when the total quantity required cannot be definitely fixed, but may be stated as an estimate or within maximum and minimum limits.

Delivery of goods, services, or construction are made upon issuance of a delivery order. A requirements contract may be exclusive, in which case all orders of goods, services, or construction covered by the contract must be made pursuant to it. In the alternative, a requirements contract may be non-exclusive, in which case the contract is not the only source of goods, services, or construction covered by it. Unless a requirements contract, and the solicitation for it, states that it is an exclusive contract, it is a non-exclusive contract. A requirements contract may not be used to unduly restrict competition and may not normally be used for large construction contracts.

- 2.4.83 **RESPONSIBILITY:** A determination, based on characteristics of an offeror, that demonstrate that the offeror is capable of satisfying the County's needs and requirements for a specific contract.
- 2.4.84 **RESPONSIBLE OFFEROR:** A person the Director has determined under section 6.3 to be capable of satisfying the County's needs and requirements for a specific contract.
- 2.4.85 **RESPONSIVE OFFEROR:** An offeror who has submitted a bid that conforms in all material respects to the requirements of an IFB or a small purchase.
- 2.4.86 **RESPONSIVENESS:** A determination that a bid complies with the material requirements of an IFB or a small purchase. The Director determines if a bid is responsive. See Responsive Offeror.
- 2.4.87 **RETENTION (RETAINAGE):** The withholding of a part of the payment due to the contractor until the time of final acceptance according to the terms of the contract. The amount retained (also known as retainage), as well as the period of retention, is determined by the terms of the contract. Retention, as a method of payment administration, is usually associated with construction contracts.
- 2.4.88 **SERVICES:** The performance of an identifiable task by furnishing labor, time or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance.
- 2.4.89 **SHORTLIST:** A list of offerors who, through a pre-qualification process, are eligible (usually through an REOI) to participate in a further process for award of one or more contracts.

- 2.4.90 **SMALL PURCHASE:** An informal solicitation of goods, construction or non-professional services valued below a certain monetary threshold.
- 2.4.91 **SOLE SOURCE:** A noncompetitive procurement in which goods, services, or construction necessary to meet minimum valid needs of the County are available from only one person as provided in Chapter 11B of the County Code including those having the exclusive right to manufacture, sell or otherwise market certain goods or services.
- 2.4.92 **SOLICITATION:** A request for offers through either a formal communication or an informal communication, with potential offerors in accordance with these regulations. A solicitation may only be made by a contracting officer or an authorized government official.
- 2.4.93 **SPECIFICATIONS:** A set of requirements for goods, services, or construction that the County wishes to acquire. A specification must indicate, whenever appropriate, the procedure by which requirements are determined to be satisfied. As far as practicable, it is desirable that the requirements be expressed in numerical or other objective terms, together with their ranges or limits. A specification may be a standard, a part of a standard, or independent of a standard. It may also be expressed as an end result. Specifications should be contained in solicitations as well as contracts. Specifications should not be overly restrictive or prejudicial to competition beyond that justified by minimum valid needs of the County.
- 2.4.94 **STANDARDIZED PROCUREMENTS:** A standardized procurement is a purchase of equipment or parts for which the CRC determines standardization and interchangeability of parts is necessary or is in the public interest. A standardized procurement should include competition when reasonably available. Standardization approval must be for a stated period which bears a reasonable relationship to the life of the equipment and the specialized training or specialized equipment necessary to maintain the standardized item. A standardization decision includes the decision to procure compatible parts, equipment, services, and training.
- 2.4.95 **TERMINATION FOR CONVENIENCE:** A termination of all or part of a contract by a contracting officer if the contracting officer determines that termination is in the best interest of the County.
- 2.4.96 **TERMINATION FOR DEFAULT:** A termination in whole or in part of a contract, at the option of the County, because of the contractor's failure to perform.

- 2.4.97 **UNSOLICITED PROPOSAL:** A proposal to render services or construction or deliver goods to the County outside of a solicitation by the County. Unsolicited proposals should be evaluated by an appropriate Using Department in terms of need, price, and funds available. If funds are available and need is present, the Using Department may initiate an appropriate solicitation as provided by these regulations, based upon the unsolicited proposal.
- 2.4.98 **USING DEPARTMENT:** Any department, office, agency, or other person subject to the procurement requirements imposed under Chapter 11B, Montgomery County Code.

3. ADMINISTRATIVE PROCESS -- PROCUREMENT

3.1 Contract Solicitations

- 3.1.1. A person working on a solicitation for the County must not release information concerning the solicitation to any unauthorized person until the solicitation is publicly issued. A person working on a solicitation, however, may obtain information from others for the purpose of determining the contents of the solicitation.

3.1.2 Formal Solicitation of Offers

- 3.1.2.1 Whenever the County engages in a solicitation process involving an IFB, RFP, or REOI, there must be public notice. The public notice should ordinarily include the solicitation document number, a description of the goods, services, or construction required, the name and telephone number of the person to be contacted for copies or information, and the due date and time for submission of offers. The Director determines how public notice is accomplished which may involve mailing to potential offerors.
- 3.1.2.2 The period of time from the date of public notice to the date a response is due is normally at least 30 days. Deviations from this normal period may be permitted if authorized by the Director.
- 3.1.2.3 Public notice concerning the solicitation should ordinarily be made available to a person on the bidder's list and any other persons identified by the Using Department.
- 3.1.2.4 The Director may grant deviations from these solicitation requirements. In authorizing the deviation, the Director must be satisfied that adequate competition is preserved to the extent possible.
- 3.1.2.5 Failure to provide a notification or solicitation document to a person, even if the person is named on the bidder's list or designated by the Using Department, does not affect the validity of the solicitation.

3.1.3 Receipt, Custody, and Opening of Offers

3.1.3.1 Receipt

- (a) All offers in response to formal solicitations must be timely received at the place designated in the solicitation document.
- (b) After receipt and identification of a timely response to a formal solicitation, the response should be immediately time-stamped and delivered as soon as practicable to a custodian designated by the Director.
- (c) A late response must be rejected and should be returned immediately to the person.

3.1.3.2 Custody of Offers

- (a) The custodian must keep the offers in a safe and secure place, and must deliver the offers at the time and to the place of opening specified in the solicitation document. During the custodianship of the offers, the custodian must maintain exclusive control and custody, and must not permit any person access to, or release any information concerning, these documents unless specifically authorized by the Director.
- (b) An offeror may request to withdraw a response to a solicitation at any time prior to the time set for the receipt of the offer for purposes of either resubmittal or complete withdrawal. This request must be received before the deadline for receipt of offers, in writing and directed to the Director, who has discretionary authority to approve the request and direct the custodian to release the appropriate offer to the offeror.

3.1.3.3 Opening of IFB's; Release of Information

- (a) Responses to IFB's must be opened on the date and time and at the place indicated in the solicitation documents, unless the Director determines that circumstances require a different date, time or place for opening.

- (b) The Director decides when the time set for opening bids has arrived and informs those present of that decision. The Director then: (1) publicly opens all bids received as of that time, (2) at the Director's option, reads the bids aloud to the persons present, and (3) leaves a copy of the bid document in the bid room for review by interested persons for a reasonable period of time or makes arrangements for the furnishing of copies of these documents to interested persons.
- (c) No statement or comment made while opening the bids is binding on the County or has any effect with respect to interpretation of the solicitation documents or responses received. Opening bids is a ministerial function as part of a public process.

3.1.3.4 **Opening of RFPs and REOIs; Release of Information**

- (a) Responses to RFPs and REOIs are not publicly opened. After the date and time responses to these solicitations are due, the offers are opened under the direction of the Director. Thereafter, they are sent to the responsible Using Department for evaluation and ranking. The envelope in which a response to an RFP or REOI was received should be kept with the response by the Using Department until a final award is made and all appeals, if any, are resolved.
- (b) Until a proposed award for an RFP is posted, or a shortlist for an REOI is posted, all responses to RFPs and REOIs are confidential information and must not be released to the public.
- (c) A request to inspect offers and evaluations is subject to the Maryland Public Information Act. Offers and evaluations of offers are available for public inspection after a proposed award has been posted, in the case of an RFP, or after a shortlist has been posted, in the case of an REOI. Confidential commercial information and other information not subject to disclosure must not be publicly disclosed at any time. The County may require an offeror to designate which information is not subject to disclosure. As a condition of keeping the information confidential, the

County may require an offeror to agree to defend and hold the County harmless if the information is not released at the request of the offeror. Information not expressly identified as confidential by the offeror may be released by the County.

3.1.4 Solicitation Cancellation

3.1.4.1 Before Time for Opening

The Director may cancel a solicitation in whole or in part before the opening or due date when it is determined that this action is in the best interest of the County. This decision should be made only after consultation with the affected Using Department.

3.1.4.2 After Time for Opening

The Director may cancel a solicitation in whole or in part after the opening or due date specified for opening when it is determined that this action is in the best interest of the County. The decision to cancel the solicitation may be based upon the following list of factors, among others:

- (a) All offers are non-responsive;
- (b) All offers are so excessively low or high as to indicate a defective statement of specifications that requires correction and reissuance of the solicitation;
- (c) Specification deficiencies are discovered;
- (d) None of the offers meet the County's requirements in terms of price or funds available;
- (e) Responses received indicate a problem in dissemination or communication of the solicitation (e.g. insufficient number received under the circumstances or inappropriate responses indicating misunderstanding of solicitation language);
- (f) Procurement requirements have changed; or

- (g) Other circumstances which indicate a failure of the solicitation process to promote full and fair competition. In making this decision to cancel a solicitation, the Director should consult with the affected Using Department.

3.1.4.3 **Notice to Offerors**

The Director should communicate cancellation of a solicitation by a method determined in the Director's sole discretion to give appropriate notice to offerors of the cancellation in the earliest possible manner. Usually notice of cancellation should be posted in the same manner as posting a proposed awardee. Offerors are not entitled to any compensation in connection with cancellation of a solicitation.

3.1.4.4 **Cancellation Final**

The decision to cancel a solicitation is final and is not subject to review.

3.2 **Contract Awards**

- 3.2.1 Upon receipt of evaluated offers and recommendations for proposed award from the Using Department, the Director may independently review and evaluate the solicitation responses. After consideration of the evaluation and recommendation of the Using Department, the Director makes a proposed award to a specific offeror. Until a proposed award is posted by the Director, all information concerning the evaluation and recommendations is confidential.
- 3.2.2 Upon determination of a proposed contract awardee for a formal solicitation, the Director must place the number of the solicitation and the name of the proposed contract awardee on a public list. The list must be available for inspection by any offeror. The date of each proposed award decision must also be indicated on the list. This list applies to formal solicitations. It is the responsibility of offerors to keep informed of the current status of any proposed award. Placement of a proposed awardee on the public list constitutes notice to all offerors of the proposed awards. The Director may make such other communications with respect to proposed awards given the particular circumstances of the solicitation.

- 3.2.3 After the posting of a proposed award, the Director initiates the process which leads to the execution of a contract for the solicited services, goods, or construction. After all necessary approvals and clearances have been obtained, the contracting officer may execute the contract with a signature on behalf of the County. The intentional release of the fully executed contract constitutes an award.

3.3 Contract Documents

A written contract document is required in connection with all procurements of goods, services, or construction in Montgomery County with the exception of direct purchases, Using Department reimbursable purchases, credit and debit card purchases and emergency procurements.

3.3.1 County Attorney Approval

- 3.3.1.1 All contracts, with the exception of direct purchases, petty cash purchases, emergency purchases, credit and debit card purchases, small purchases, and delivery orders against existing contracts, must be submitted to the Office of the County Attorney for review and approval. Ordinarily, the contract should be submitted to the Office of the County Attorney after signature recommending it by the Using Department Head and before signature by the prospective contractor and the contracting officer. The Office of the County Attorney may authorize exceptions for certain classes of contracts or give advance approval of specific contracts or classes of contracts that do not require review and approval by the Office of the County Attorney; this authorization must be in writing with a copy forwarded to the Director.
- 3.3.1.2 The Office of the County Attorney may approve, approve with conditions, or reject any contract submitted. If approved with conditions, all conditions must be satisfied prior to submittal to the contracting officer for signature. Any contract requiring County Attorney approval is voidable at the option of the County at any time, if County Attorney approval has not been obtained.

3.3.2 Signatures

- 3.3.2.1 All contracts, unless otherwise determined by the Director must contain the signature of the offeror and the signature of the contracting officer. The signature of the head of the Using Department recommending approval of the Contract should also be included.
- 3.3.2.2 Signatures of offerors and contractors must be in their correct legal form and must not be abbreviated to common usage or trade name form. All signatures must be made by an authorized officer, partner, manager, member, or employee. The signing of an offer or a contract is a representation by the person signing that the person signing is authorized to do so on behalf of the offeror or contractor. Contracts that are not signed in compliance with these requirements are voidable at the option of the County.
- 3.3.2.3 Prior to the execution of the contract by the contracting officer, sufficient documentation of an encumbrance to cover the appropriate contract amount must be submitted to the contracting officer. Contracts may contain "subject to appropriation" conditions which authorize the contracting officer to execute the contract without encumbrance documentation, if approved by the Office of the County Attorney. The contracting officer must approve any reduction in an encumbrance after a contract is executed.
- 3.3.2.4 A Notice to Proceed under a contract must not be issued until the contract is awarded.
- 3.3.2.5 Original contract signatures must be in ink, unless otherwise authorized by the Office of the County Attorney. When volume of signatures or time is a consideration, a facsimile signature may be authorized by the person whose signature is represented by the facsimile. Facsimile signatures may be used only under conditions authorized by the Director.

3.4 Records Retention

- 3.4.1 Under the Director's supervision and at the Director's direction, contract records must be retained by Departments which have responsibility for their original compilation for such period of time and under such conditions as

determined by the Director. The Director must maintain all other contract records.

- 3.4.2 All contract records must be maintained for a minimum of 5 years after the latest date of completion of a contract or date of final payment whichever is later.
- 3.4.3 The Director may develop and issue minimum standard formats and procedures for procurement and contract administration records.

4. SOURCE SELECTION METHODS AND CONTRACT TYPES

4.1 Description of Source Selection Methods

4.1.1 Formal Solicitations -- Invitation for Bid (IFB)

4.1.1.1 General

An IFB is a formal solicitation by which competitive sealed bids are invited through a public notice procedure which results in an award to the lowest responsible, responsive offeror.

4.1.1.2 Use

IFBs are normally used when the procurement is for construction, goods, or non-professional services. An IFB is used for procurements valued at \$25,000 or more. An IFB may be used for professional services if the Director determines that:

- (a) Specifications are defined in sufficient detail to allow a contract award without further need to clarify the scope of work; and
- (b) The ability of the offeror may be established through criteria such as years of experience, licenses held, degrees awarded, or other objectively measurable criteria.

4.1.1.3 Contents

An IFB should include the following information:

- (a) Instructions to offerors in a form authorized by the Director.
- (b) A notice of the date, time and place for submission of the bids and for the bid opening, and a statement of the number of copies required to be submitted.
- (c) The date, time, and place where the pre-bid conference, if any, will be held.

- (d) The identity and telephone number of a contact person within the Using Department for technical information pertaining to the solicitation. The identity and telephone number of a contact person in the Office of Procurement for administrative information relating to the solicitation.
- (e) A description of or specification (including any plans or designs) for the construction, goods, or services that are to be procured, with sufficient specificity and detail to permit full and free competition and direct incorporation into a contract document without need for further change or amendment.
- (f) A concise explanation of the method of the award, e.g., whether the award is based on the lowest bid price, the lowest evaluated bid price, or some other cost or price criteria, whichever is applicable. If an evaluated bid price is used, the objective measurable criteria to be used must be set forth in the IFB. These criteria may include:
 - (1) length of the usable life of the particular goods as compared to competitive goods;
 - (2) the degree and quality of services;
 - (3) the environmental impact of the goods and services being offered;
 - (4) the resale value of the goods; and
 - (5) the operating costs associated with the goods such as:
 - (A) availability, cost, quality, and delivery of parts
 - (B) availability and cost of service; and
 - (C) cost of maintaining a spare parts inventory.

In addition, where alternates are solicited, the IFB must specify whether alternates will be considered in the

evaluation of the bid and, if so, must indicate the basis for utilization of alternates in arriving at a determination of the lowest bid price or the lowest evaluated bid price.

- (g) A listing of all required submissions by the offeror including samples, descriptive literature, and all other submissions which, if missing from the solicitation response, are grounds for disqualification as being non-responsive.
- (h) All mandatory clauses.
- (i) Optional provisions applicable to the particular procurement involved, as appropriate.
- (j) A statement of the MFD requirements, if applicable, as authorized by the Director.
- (k) Insurance and bond requirements, if applicable.
- (l) A provision that requires acknowledgment by offerors of all solicitation amendments.
- (m) Information pertaining to delivery and performance under the contract.
- (n) An identification of the administrators of the contract, a statement of requirements for inspection and acceptance by the Using Department and a delineation of authorities and responsibilities of the Using Department with respect to the contract (i.e. authority to recommend payment of invoices, non-authority to amend the contract, etc.).
- (o) A statement that the bid may be accepted within 120 days (or such other time as approved by the Director) from the date of opening of the bids.
- (p) All IFBs must provide appropriate spaces for:
 - (1) All bid prices which must be the basis for the award; and

- (2) Signature by a person authorized to bind the offeror to the bid, indicating agreement with all provisions of the IFB.

4.1.1.4 **Procedure**

- (a) IFBs are issued and public notice given under the direction of the Director.
- (b) Responses to the IFB are received by the Director, as specified in the solicitation, time-stamped, and publicly opened.
- (c) Bids are tabulated and forwarded to the Using Department for evaluation when deemed appropriate by the Director or when specifically requested by the Using Department Head.
- (d) The Director may require the Using Department or other person to evaluate the bids in accordance with the method of award criteria, and for responsiveness and responsibility, and forward recommendations to the Director. These recommendations must include an evaluation regarding the reasonableness of the proposed award prices. If retained by the Director, the Director evaluates the bids in accordance with the method of award criteria, and for responsiveness and responsibility.
- (e) In the case of tie bids, the Director resolves a tie by application of the following in the order stated:
 - (1) Making a proposed award of the contract to the bidder who has its principal place of business in Montgomery County;
 - (2) Making a proposed award of the contract to the bidder who is a certified MFD business prior to submitting a bid;
 - (3) Drawing of lots with representatives of the firms involved invited to be present.

- (f) The Director reviews the recommendations of the Using Department and, if necessary, conducts an independent review of the bid responses, and makes a proposed award decision.
- (g) The name of the proposed contract awardee or notice of IFB cancellation is placed on a public list by the Director.
- (h) The Director reviews the contract for conformance to the requirements of the Office of the County Attorney.
- (i) The Director ensures the encumbrance of required funds, as appropriate, and executes the contract on behalf of the County. The Director provides for distribution of copies of the contract to the Using Department and the contractor.

4.1.2 **Formal Solicitation - Best Value Procurement -- Request for Proposals (RFP)**

4.1.2.1 **General**

An RFP is a formal solicitation for competitive sealed proposals. Proposals are not publicly opened. An RFP is a procurement process in which quality and price are balanced to obtain the best value for the County. Final costs and scope of work are subject to negotiation after the proposals are received and before the contract is awarded unless otherwise stated in the RFP.

4.1.2.2 **Use**

- (a) An RFP is used for the procurement of professional services or a system that includes professional services.
- (b) An RFP is utilized when (1) a Using Department can generally formulate the scope of work or specifications for the services or system to be acquired; (2) there are known sources of supply; (3) competition is anticipated; and (4) the procurement is valued at \$25,000 or more.
- (c) An RFP is used when other considerations as well as cost are valid criteria in the evaluation of offers.

- (d) An RFP may also be used for the procurement of construction, goods, or nonprofessional services when the County judges that the use of evaluation criteria authorized for use in an RFP would promote the best interests of the Government. Approval to use an RFP instead of an IFB for the procurement of construction, goods, or nonprofessional services must be obtained from the Director.

4.1.2.3 **Contents**

An RFP should include the following information:

- (a) A notice of the date, time and place for submission of proposals and a statement of the number of copies required to be submitted.
- (b) The date, time, and place where a pre-proposal conference, if any, will be held.
- (c) The identity and telephone number of a contact person within the Using Department for technical information pertaining to the solicitation. The identity and telephone number of a contact person in the Office of Procurement for administrative information relating to the solicitation.
- (d) A brief description of the project and scope of work. The scope of work should be described with sufficient specificity and detail to permit full and free competition .
- (e) A concise explanation of the method of award, that includes identification of all criteria and relative weights for each criterion.
 - (1) The Using Department, however, may choose not to publish relative weights for each criterion, in which case the Using Department must indicate to the Director its decision to maintain the weights as confidential until after award and, on a separate document, forward the relative weights to the Director. If oral interviews are contemplated, the objective criteria for determining when, how many,

and which offerors are eligible for the interview stage must be specified.

- (2) An explanation of point scoring for screening and interview steps must also be included (e.g. an explanation of the relationship between written submissions and oral interview evaluations).
- (3) If the Using Department determines that guidelines would assist the QSC in evaluating an award criterion, the Using Department must develop for use by the QSC scoring guidelines for that criterion. Normally the Using Department should develop guidelines for a cost criterion. If the Director requests, the Using Department must send the Director a copy of the scoring guidelines with the QSC evaluation. These guidelines are confidential until a proposed award is posted.
- (4) The RFP may contain a minimum score which establishes a threshold that an offeror must achieve in order to be considered for an award under the RFP. In the alternative, the RFP may provide for a multi-step process, each step constituting a pre-qualification process (e.g., top five rated offerors based on scoring of written evaluations proceed to a final evaluation stage which may include cost competition or oral interviews).
- (5) Evaluation criteria may include:
 - (A) General experience and technical competence.
 - (B) Past performance record on other County projects.
 - (C) Related experience on similar projects.
 - (D) Compatibility of size of firm with size of proposed project.

- (E) Knowledge of local conditions, codes and ordinances where such knowledge is essential to the proper performance of the contract.
 - (F) Current total workload of the offeror and the capacity to accomplish the proposed work in the required time.
 - (G) Special familiarity with project or project site.
 - (H) Special qualifications, experience, design approach, etc.
 - (I) Originality and design quality of previous work.
 - (J) Adequacy of office facilities where services will be rendered.
 - (K) Involvement of consultant's management and participation of key officials in the project.
- (6) Evaluation criteria must include appropriate cost factors. Points assigned to the cost criterion must be contained in the decisive selection step (e.g., final interview stage or last screening step when no interviews are held). The cost criterion may be contained in earlier steps in the selection and evaluation process, if the points in that earlier step are part of the final total point score.

At least 10 percent of the total points for all evaluation criteria must be assigned to the cost factor. Ten percent is a minimum value and may only be used with the approval of the Director; Using Departments should use, in appropriate procurement situations, a cost selection factor greater than ten percent.

An RFP may provide for a selection process that requires each offeror who meets a pre-established score to compete for designation as the top-ranked offeror on the basis of price alone. A price submission under this process must be submitted in a sealed offer. If required in the RFP, the price offer must be binding on the offeror. The RFP may require that the price offer be submitted at any point during the evaluation process.

Hourly rates for personnel, cost data, and proposed costs must include all multipliers and overhead charges (e.g., General and Administrative overhead, profit, etc.).

- (7) As an alternative to including a cost criterion, a Using Department may utilize a pre-planned cost negotiation process if authorized by the Director.

The pre-planned cost negotiation process allows the Using Department to negotiate with the top ranked offeror under a process which ensures a fair and reasonable cost for the contract. This process includes a written analysis, supported by appropriate documentation, of reasonable cost or ranges of cost for each category of goods or services and an estimated value of the entire contract work. This analysis must be provided to the Director by the Using Department prior to opening of the proposals. The Using Department negotiates the price of the contract with the top-ranked offeror; the price should fall within the amount estimated in the Using Department's analysis.

- (8) References must not be used as an evaluation criterion.
- (f) All mandatory clauses.
- (g) Optional provisions applicable to the particular procurement involved, as appropriate.

- (h) A statement of the MFD requirements, if applicable.
- (i) Insurance and bond requirements, if applicable.
- (j) A provision which requires acknowledgment of all amendments or addenda by offerors.
- (k) Information pertaining to delivery and performance under the contract.
- (l) An identification of the administrators of the contract, a statement as to requirements for inspection and acceptance by the Using Department, and a delineation of authorities and responsibilities of the Using Department with respect to the contract (i.e., authority to recommend payment of invoices, authority to review the work and approve it, non-authority to amend the contract, etc.).
- (m) A statement that the proposal may be accepted within 120 days (or such other time as approved by the Director) from the date established for receipt of offers.
- (n) In the RFP, the Using Department must provide an appropriate space for signature by a person authorized to bind the offeror to the proposal, indicating agreement with all terms and conditions of the proposal.

4.1.2.4 **Procedure**

- (a) RFPs are issued and public notice given under the direction of the Director.
- (b) The Director forwards, without public opening, timely proposals that are received by the Director to the Using Department for evaluation.
- (c) The QSC evaluates all proposals received from the Director, in accordance with the evaluation criteria, and reviews offerors for responsibility.
 - (1) The chair of the QSC is responsible for assuring that the proper evaluation procedures are followed

by the QSC. Questions regarding specific procedural issues should be referred by the chair to the Director. Decisions of the QSC must be determined by majority vote.

- (2) Although each member of the QSC must exercise independent and impartial judgment in evaluating a proposal, the QSC must award to each offeror a single score for each criterion. The score should be issued on such information as a reasoning mind might accept as adequate to support the score. It is within the QSC's province to resolve conflicting information regarding a potential awardee and, where inconsistent inferences can be drawn, it is for the QSC to draw those inferences.
- (3) The evaluation must be based solely on the material presented to the entire QSC pursuant to the submission requirements of the RFP. Accordingly, each member of the QSC must be present during such evaluation procedures as site visits, demonstrations, and interviews.
- (4) Each member of the QSC must participate, and vote in the scoring of each proposal. If a member of the QSC does not complete the evaluation process, the Director must determine how the QSC evaluation process must proceed. The Director may establish a process that will maintain a fair and competitive evaluation process including:
 - (A) Requiring the remaining members to proceed with the evaluation;
 - (B) Requiring that scores already awarded be adopted;
 - (C) Appointing a new member to the QSC;
 - (D) Requiring the QSC to evaluate proposals anew; and

(E) Convening a new QSC.

(5) A member of the QSC may not participate in the evaluation and selection process if that member cannot render an independent and impartial judgment because of a relationship with an offeror. Each member of the QSC must certify in writing that:

(A) the member has used independent and impartial judgment as a member of the QSC;

(B) that the member has complied with the requirements of:

(i) Section 19A-11, Montgomery County Code, which prohibits participation in matters where there is a conflict of interest;

(ii) Sections 19A-12 and 11B-52, Montgomery County Code, which prohibit employment relationships between a County employee and an offeror;

(iii) Section 19A-15, Montgomery County Code, which prohibits the disclosure of confidential information;

(iv) Sections 19A-16 and 11B-51, Montgomery County Code, which prohibit the solicitation or acceptance of gifts from offerors; and

(C) no relative or member of the QSC's household (as both terms are defined in the Montgomery County Public Ethics Law) will be affected by any contract awarded under the solicitation.

- (6) The formal meetings of a QSC during which proposals are evaluated are closed to non-QSC members.
 - (7) The QSC may at any time meet with other County staff as to procedures, standards, and technical information relative to the solicitation, but not regarding the content of specific proposals.
 - (8) The QSC may meet with County staff and a consultant regarding a solicitation, including the contents of a specific proposal, with the specific concurrence of the Director.
- (d) In the case of a numerical score tie, the Director resolves the tie by application of the following in the order stated:
 - (1) Making a proposed award of the contract to the offeror who has its principal place of business in Montgomery County;
 - (2) Making a proposed award of the contract to the offeror who is a certified MFD business prior to submitting a proposal;
 - (3) Drawing of lots with representatives of the firms involved invited to be present.
- (e) After the QSC ranks the offerors, the QSC must forward to the Using Department Head the recommended ranking, including a recommendation of the responsibility of the proposed awardee.
- (f) The Using Department Head reviews and forwards the QSC recommendation with concurrence, objection, or amendment to the Director. The Using Department Head may also recommend cancellation of the procurement. These recommendations must be accompanied by QSC conflict of interest certifications and a score sheet summarizing the scores awarded by the QSC to each offeror.

- (g) The Director approves, approves with conditions, or rejects the recommendations and supporting documentation. If the Director agrees with the QSC recommendation and the recommendation of the Using Department Head, the Director may proceed immediately to place the recommended offerors on a public list. If the Director approves with conditions, the Using Department must satisfy the conditions and provide appropriate documentation of compliance to the Director, prior to commencing contract negotiations. If the Director rejects a recommendation for award, the RFP package is returned to the Using Department Head for further action as indicated by the Director.
- (h) The Director places the name of each proposed awardee or notice of cancellation on a public list.
- (i) After the Director's approval, the Director or the Using Department negotiates the contract with the proposed awardee. The Using Department is responsible for coordination of MFD compliance review with the Director. If a contract cannot be successfully negotiated with the proposed awardee, the Using Department proceeds to negotiate with the next highest ranked offeror after obtaining approval from the Director. In this event the Director must designate the next highest ranked offeror as a proposed awardee and place the name on a public list.
- (j) If the Director approves, negotiations may be held simultaneously with both the proposed awardee and the next highest ranked offeror. In this event, the Director must also designate the next highest ranked offeror as a proposed awardee.
- (k) Once the contract has been negotiated to the Director's satisfaction, and the Director has ensured the encumbrance of required funds, the Director may execute the contract on behalf of the County. The Director provides for distribution of copies of the contract to the Using Department and the contractor.

- (l) A Notice to Proceed, if necessary, is issued by the authorized government official, pursuant to provisions of the contract.

4.1.3 **Abbreviated Formal Solicitations**

4.1.3.1 **General**

An abbreviated formal solicitation is a method for obtaining competitive sealed bids or competitive sealed proposals by using an abbreviated formal solicitation process.

4.1.3.2 **Use**

An abbreviated formal solicitation may be used if the Director finds:

- (a) the estimated value of the procurement, including any extension, is \$100,000 or less; and
- (b) the abbreviated formal solicitation process is in the best interest of the County.

4.1.3.3 **Procedure**

- (a) If the solicitation would normally be accomplished under an IFB, the following changes are made to the IFB process:
 - (1) The Office of Procurement issues notice of the IFB to at least 25 randomly selected potential bidders on the bidder's list or all of those on the bidders list, whichever is smaller. The Office of Procurement may also issue notice to additional potential bidders. At least 20%, if available, of those who are sent notice of the IFB should be minority owned businesses. The previous supplier of the goods, services, or construction being acquired should also receive notice of the IFB.
 - (2) The IFB should allow a bidder a minimum of 10 days in which to submit a bid.

- (b) If the procurement would normally be accomplished under an RFP, the following changes are made to the RFP process:
 - (1) The Office of Procurement issues notice of the RFP to at least 25 randomly selected potential offerors on the bidder's list or all potential offerors on the bidder's list, whichever is smaller. The Office of Procurement may also issue notice to additional potential offerors. At least 20%, if available, of those who are sent notice of the RFP should be minority owned businesses. The previous contractor who supplied the goods, services, or construction being purchased should receive notice of the RFP.
 - (2) The RFP should allow an offeror a minimum of 10 days in which to submit a proposal.

4.1.4 **Formal Solicitations - Request for Expressions of Interest (REOI)**

4.1.4.1 **General**

An REOI is a formal solicitation for competitive sealed responses containing qualifications and other requested information from prospective sources of the County's requirements. An REOI is initiated to obtain essential procurement information needed to prepare a subsequent solicitation. The purpose of an REOI is to develop a ready source of potential offerors who can respond within a short time frame to the subsequent solicitation. An REOI may be used to resolve technological or programmatic questions relative to how requirements can best be supplied. Responses to REOIs are not publicly opened and are analyzed in accordance with evaluation criteria set forth in the REOI for the purpose of developing a shortlist of prospective offerors. Evaluation criteria contained in an REOI should be confined to technical considerations and expertise, and should not ordinarily contain considerations of cost.

4.1.4.2 **Use**

- (a) REOIs are used where sources of supply are not readily identifiable and there is a need to define both sources of supply and qualified interest in meeting certain County needs.
- (b) REOIs are used when the end result or product has been generally articulated by the County, but the technical approaches or specifications for the product are not sufficiently defined to insure effective competition.
- (c) REOIs are used when there are continuing procurement needs in certain technical areas and readily available qualified sources of supply are necessary to meet timely government requirements. Once the sources of supply are identified, they may be the exclusive sources to which expedited solicitations are directed.

4.1.4.3 **Contents**

An REOI should include the following information:

- (a) A notice of the date, time and place for submission of proposals and a statement of the number of copies required to be submitted.
- (b) The date, time and place where a pre-submission conference, if any, will be held.
- (c) The identity and telephone number of a contact person within the Using Department for technical information pertaining to the solicitation. The identity and telephone number of a contact person in the Office of Procurement for administrative information relating to the solicitation.
- (d) A brief description of the project desired and a statement of parameters within which the services are to be rendered. Such description should contain sufficient detail to constitute meaningful notice to potential suppliers and to facilitate responses.

- (e) A concise explanation of the method of ranking and shortlisting, which must include identification of all evaluation criteria and relative weights for each criterion. Evaluation criteria may include those criteria used to evaluate proposals in response to an RFP.

Evaluation criteria for REOIs should not normally include cost factors. If oral interviews are contemplated, the objective criteria for when, how, and which respondents are eligible must be specified. An explanation of point scoring must also be included (e.g. the relationship between written submissions and oral interview evaluations).

The REOI may contain a minimum score which establishes a threshold that an offeror must achieve in order to be considered for inclusion on the shortlist.

- (f) A statement of the maximum number of respondents to be included in the shortlist or objective criteria by which a cut-off is established.
- (g) The REOI should also specify the method by which subsequent contract awards are to be made under the shortlisting which results from the REOI, e.g., IFB or RFP.
- (h) A provision that requires acknowledgment by offerors of all solicitation amendments.
- (i) A statement of the period of time that the shortlist is effective and subject to subsequent solicitations or identification of a specific subsequent solicitation to which the shortlist is applicable.
- (j) In the REOI, the Using Department must provide a specific place for signature by the person authorized to bind the responding firm to its expression of interest, including all representations made and information furnished in response to the REOI.

4.1.4.4 Procedure

A procurement pursuant to an REOI is accomplished by the subsequent issuance of one or more solicitations, as stated in the REOI document. The REOI solicitation is accomplished by the following steps:

- (a) REOIs are issued and public notice given under the direction of the Director.
- (b) The Director forwards, without public opening, timely proposals received by the Director to the Using Department for evaluation.
- (c) The QSC evaluates the proposals received from the Director, in accordance with the evaluation criteria, reviews offerors for responsibility, and forwards its recommendations to the Using Department Head. The QSC evaluation process and QSC certification which applies to an RFP also applies to evaluation of an REOI proposal.
- (d) In the case of a numerical score tie for the last cut-off position (e.g. a tie at 5th place when top five are shortlisted), all firms tied at that position are added to the shortlist.
- (e) After Director approval, the names of the proposed shortlisted firms are placed on a public list by the Director.
- (f) For purposes of subsequent solicitations, there is no ranking within the shortlist, and all firms contained on the shortlist are to be considered of equal merit. A shortlist established by an REOI constitutes the exclusive pool of prospective offerors for future solicitations specified in the REOI.
- (g) When appropriate and pursuant to the terms of the REOI, the Using Department initiates one or more solicitations for distribution to the entire shortlist resulting from the REOI. Each solicitation must meet all requirements of these regulations, including MFD requirements as appropriate.

- (h) The Director may authorize the Using Department to negotiate a contract with a responding firm without issuing a subsequent solicitation if:
 - (1) only one firm responded to the REOI; and
 - (2) the Director makes a determination and finding that negotiation is in the best interests of the County.

4.1.5 Competitive Negotiation

4.1.5.1 General

Competitive Negotiation is a negotiation process that is authorized pursuant to Chapter 11B, Montgomery County Code. It is a method of procurement which may take place only after an IFB or RFP has failed to produce acceptable bids or proposals and only after a determination and finding by the Director that further competitive bidding would be impractical and not in the best interest of the County. It is an attempt to negotiate a contract to meet, as nearly as possible, County requirements.

4.1.5.2 Use

Competitive negotiation is used when the Director determines at least one of the following exists after the required solicitation:

- (a) No bids or proposals are received by the time and date specified in the solicitation;
- (b) Only one bid is received;
- (c) The Director has determined that none of the bids or proposals received are acceptable;
- (d) None of the bids or proposals received meets County price or budget limitations, including fairness and reasonableness of price; or
- (e) The Director has determined that none of the offerors are responsible.

4.1.5.3 **Procedure**

- (a) Prior to the commencement of negotiations, the Director must notify by public listing the County's intent to negotiate a contract under this section.
- (b) Competitive negotiations may be accomplished as follows:
 - (1) Where no timely bids or proposals are received or only one timely bid is received, negotiations may take place concurrently with all those solicited who indicate a desire to participate in the negotiations, after notice by public posting and other informal communications inviting participation deemed appropriate by the Director;
 - (2) Where bids or proposals are received, negotiations may be held with the bidder or proposer who most nearly complies with the County's requirements (including price) to attempt to reach and negotiate an acceptable offer. If negotiations fail with the most qualified bidder or proposer, negotiations may proceed to the next most qualified bidder or proposer, upon authorization from the Director.

4.1.6 **Open solicitation**

4.1.6.1 **General**

An open solicitation is a process by which the County accepts applications for a contract on a continuing basis and awards a contract to each applicant who meets pre-established objective qualifications. An open solicitation permits the County to receive and act on an application for a contract award on a continuing basis.

4.1.6.2 **Use**

An open solicitation is used when the County desires to award a contract to all persons who meet pre-established objective qualifications. Examples of when an open solicitation might be used are:

- (a) Obtaining instructors for teaching classes to the general public under programs sponsored by a Using Department;
- (b) Obtaining participants in a grant program sponsored by a Using Department;
- (c) Providing goods or services to clients identified by a Using Department, if:
 - (1) the client selects the source of goods or services; or
 - (2) the client referred is based on an objective method (e.g., rotating basis, geographical proximity); and
- (d) Obtaining goods or services under a requirements contract if the Using Department selects the source by an objective method (e.g., rotating basis, geographical proximity).

4.1.6.3 **Procedure**

- (a) The Using Department submits to the Director for approval of a plan which:
 - (1) Provides for periodic public notice inviting potential contractors to apply for a contract;
 - (2) Establishes an application process for a potential contractor to follow in order to obtain a contract under the open solicitation;
 - (3) Establishes the objective qualifications for potential contractors;
 - (4) Uses a pre-approved form contract which each successful contractor will be required to execute; and
 - (5) Ensures that the cost of all contracts entered into under the plan will not exceed available appropriated funds.

- (b) The Director, or if authorized by the Director the Using Department Head, may award a contract to a person who meets the pre-established objective qualifications under the open solicitation if the solicitation and contract are consistent with the plan approved by the Director.

4.1.7 **Informal Solicitation -- Mini-Contract**

4.1.7.1 **General**

A mini-contract is a contract for professional and, under special circumstances, non-professional services valued above \$5,000 and under \$25,000 which is the result of an informal solicitation process. This process does not require any type of public notice; however, informal competition is maintained in order to obtain the most advantageous responsible offeror. The solicitation process requires, at a minimum, documented oral or written contact with prospective offerors, documentation of MFD efforts, and documentation of the results of that contact. A mini-contract is not subject to renewal nor amendment which would increase its value beyond the maximum limit.

4.1.7.2 **Use**

- (a) A professional services mini-contract is used for the procurement of professional services.
- (b) A mini-contract may be used for non-professional services, goods, or construction valued above \$5,000 and less than \$25,000 if the Director determines that the use of evaluation criteria other than price would promote the best interests of the County.
- (c) This contract procedure may not be used when the total expenditure (including all extensions) for the project or services to be procured is expected to equal or exceed \$25,000. Using Departments may not divide contracts (splitting) for the purpose of avoiding the \$25,000 limit.

4.1.7.3 **Contents**

A mini-contract should include the following:

- (a) Mandatory clauses.
- (b) An identification of the contractor and a signature which binds the contractor to the contract.
- (c) A clear and concise statement of the scope of work to be performed under the contract.
- (d) A statement of the term of the contract or dates for initiating and completing performance or both.
- (e) A statement of compensation to be received under the contract, including all payment provisions.
- (f) Such additional information with respect to contract performance as is required for the particular contract.
- (g) Where there is a written proposal received from the successful offeror, the Using Department may utilize a form that references the proposal and incorporates the applicable mandatory clauses. This form must be in a form approved by the Office of the County Attorney.

4.1.7.4 Procedure

- (a) The Director must provide the Using Department with the names of 5 randomly selected potential offerors selected from the bidder's list or all potential offerors on the bidder's list, whichever is smaller. One of the potential offerors selected by the Director should be a minority owned business. One of the potential offerors identified by the Director should be the previous supplier of the services, goods, or construction being acquired. The Using Department must attempt to contact each potential offeror identified by the Director. The Using Department may also contact additional potential offerors identified by the Using Department. The Using Department must document fully the contact including recording the name of the firm contacted, the name of the person and position within the firm contacted, and the response received. The contact may consist of oral or written communication. With respect to each offer received, the Using Department must

document: (1) whether the offeror indicated a willingness and ability to meet the scope of work in a timely manner; (2) the price quoted for the services to be rendered, and (3) other information pertinent to the procurement decision.

- (b) The Using Department makes a determination concerning the most advantageous awardee considering price and other pertinent factors. The Using Department must document the basis of the selection and negotiate a contract with the preferred offeror.
- (c) The Using Department forwards the executed contract to the Director with all required documentation, including a forwarding memorandum signed by the Using Department Head stating that: (1) the competitive requirements of this type of procurement have been met; (2) the price is fair and reasonable for the services to be rendered; (3) the offeror is responsible; (4) all attempts to procure MFD contracting including the MFD status of the successful awardee; and (5) the selection, based on price and other considerations, was in the best interest of the County. A purchase requisition document should accompany the executed contract.
- (d) The Director receives the contract from the Using Department, ensures the encumbrance of required funds as appropriate, reviews the contract for compliance with the requirements of these regulations, and executes the contract on behalf of the County. The Director may refer any contract to the Office of the County Attorney for review. The Director distributes copies of the contract to the Using Department or the offeror.

4.1.8 Informal Solicitation -- Small Purchases

4.1.8.1 General

A small purchase is an informal solicitation for goods, construction or services valued above \$5,000 but less than \$25,000. The small purchase is a solicitation initiated by the Using Department and handled solely by the Director who is responsible for ensuring appropriate informal competition and

appropriate documentation. This procurement method should preserve competition on an informal basis and an award must be based on price, responsiveness, and responsibility. The Director must contact at least 5 randomly selected potential offerors selected from the bidder's list or all potential offerors from the bidder's list whichever is smaller. At least one of the potential offerors to be selected should be a minority owned business. The Director should include among those contacted the previous supplier of the goods, construction or services being acquired.

4.1.8.2 Contents

A small purchase consists of a purchase order document with the successful offeror in a form approved by the Office of the County Attorney. The purchase order document should contain, at a minimum, a clear statement of specifications to be met, delivery schedules and other performance requirements, a statement of compensation to be received by the bidder with payment provisions, and signatures by the offeror and the Director. The purchase order document must also contain mandatory clauses as required by the Office of the County Attorney. In the case of telephonic communications authorized by the Director, a signature from the offeror is not required. When a written proposal is received, a signature on the written submission from the offeror is sufficient.

4.1.9 Direct Purchases

4.1.9.1 General

A direct purchase is an informal procurement of construction, goods or services with a total value of no more than \$5,000. Competition should be preserved with this method to the extent practicable. Procurements with MFD firms are encouraged. Subject to revision by the CAO, the direct purchase is handled pursuant to the direct authority of a Using Department Head who is solely responsible for making a proper purchase under these procedures. The Using Department Head must seek fair and reasonable prices for all construction, goods and services obtained under this method.

4.1.9.2 Use

Direct purchases are used to secure goods, construction, or services, when the value of the purchase is not greater than \$5,000. Direct purchase procedures may not be used when the construction, goods and services to be obtained are covered by any existing requirements contract with the County, unless expressly authorized by the Director. The Using Department should consult with the Director to ascertain the existence of relevant alternative sources. Purchases which in the aggregate would exceed the limit on this type of procurement may not be subdivided or split to procure within the direct purchase limitations. When the need for a particular product or service occurs within a reasonable time frame and can be consolidated, the purchase must be consolidated and not subdivided.

4.1.9.3 Contents

- (a) A direct purchase consists of
 - (1) a Request for Payment form directed to the Department of Finance, Division of Accounts; and
 - (2) an invoice or receipt from the vendor.
- (b) The Request for Payment form must, at a minimum, contain the name and address of the offeror to be paid, signature of the Using Department Head and a description of the construction, goods or services procured and the appropriate account code.
- (c) By signing the Request for Payment form, the Using Department Head certifies:
 - (1) The purchase is necessary.
 - (2) Funds for the purchase have been appropriated and are available.
 - (3) The purchase is not covered by any existing requirements contract with Montgomery County, unless authorized by the Director.

- (4) The purchase is of a complete and distinct item or service, not related to another or easily combined with another, and the purchase is not of a continuing, repetitious, or periodic nature (large orders may not be subdivided to avoid limits of this procedure). For purposes of this affirmation, substantially similar items are considered to be equal.
- (5) The price is fair and reasonable.

4.1.10 **Petty Cash**

4.1.10.1 **General**

A petty cash purchase is an informal purchase of goods or services by an employee which is authorized by the Using Department Head and for which the employee is reimbursed by a petty cash voucher executed by an authorized Using Department representative. This method of procurement may not be utilized when the total value of the goods or services exceeds \$100.

4.1.10.2 **Use**

Petty cash purchases are used when the goods and services are valued at \$100 or less and there is a Using Department authorization for the expenditure and reimbursement. This purchase may be authorized by the Using Department and utilized when immediacy or administrative convenience is a paramount need of the Using Department.

4.1.10.3 **Contents**

A petty cash purchase consists of:

- (a) a receipt for the goods and services purchased; and
- (b) a properly completed and executed petty cash voucher which identifies the expenditure and contains the authorizing signature of an authorized government official.

4.1.11 Emergency Procurements

4.1.11.1 General

An emergency procurement is an informal procurement of goods, construction, or services required as a result of an emergency, i.e., any dangerous condition or unforeseen curtailment, diminution or termination of an essential service which poses an immediate danger to health, life or property. An emergency procurement may be authorized by the Director if the Director is available to authorize the procurement, or by the Using Department Head if the Director is unavailable. The emergency procurement requires documentation of the facts that constitute the emergency. Procurements under this section are limited to those goods, construction, or services required to meet the emergency, and must be made with competition to the extent practical under the circumstances.

4.1.11.2 Use

An emergency procurement is used when there exists facts, properly documented, which constitute an emergency.

4.1.11.3 Contents

- (a) If the Director authorizes an emergency procurement, the Using Department Head must send the Director a memorandum within 5 days after receipt of oral or written authorization to undertake an emergency procurement. The memorandum must include a complete description of the facts and circumstances of the emergency and a description of the goods or services obtained, including the actual price or a not-to-exceed amount. The Using Department Head should deliver a copy of the memorandum to the CAO as soon as practicable.
- (b) If the Using Department Head authorizes an emergency procurement, the Using Department Head must forward within 5 days the memorandum described above to the Director and the CAO. The memorandum must also contain the date of the authorization and name and title of

the authorized government official who authorized the emergency procurement.

- (c) Whenever practical, the Using Departments should, in making an emergency procurement, use contract documentation required for a mini-contract or a small purchase. Other types of documentation may be used (e.g., direct purchase) if authorized by the Director. Copies of documents must be furnished to the Director.

4.1.11.4 **Authority**

If the Director is not available, the Using Department Head may authorize an emergency procurement and issue a contract. These persons are authorized to take expeditious action to ensure timely contractor performance to meet the emergency. Contract issuance authority includes authority to sign contract documents that bind the County.

4.1.12 **Non-Competitive Procurements**

4.1.12.1 **General**

A non-competitive procurement is the acquisition by contract of a valid County requirement without prior public notice and without competition.

4.1.12.2 **Authority**

The Director may make a non-competitive award unless the non-competitive award is based on a sole source justification and the estimated value of the award is above \$25,000. If the estimated value of the non-competitive award based on a sole source justification exceeds the threshold for an IFB or RFP, the CRC may approve a non-competitive award after reviewing justification from the Using Department and review from the Office of Procurement. A non-competitive award must be based on a determination and finding.

4.1.12.3 **Use**

A non-competitive procurement may be made if the non-competitive award serves a public purpose and one or more of the following factors exist:

- (a) There is only one source for the required goods, service, or construction which can meet the minimum valid needs of the County. The basis for identifying a sole source includes:
 - (1) Proprietary, patented, or copyrighted items or information are available from only one source;
 - (2) The valid performance or delivery due dates required by the County can be met by only one source;
 - (3) The required compatibility of equipment, accessories, software, or replacement parts can be met by only one source;
 - (4) The County requires for trial use or testing an item or service available from only one source;
 - (5) Required public utility services are available from only one source; or
 - (6) A continuous series of procurements from a single source over a period of time is advantageous as demonstrated by a cost benefit analysis demonstrating that considerations of training, replacement parts, and compatibility with existing capital investments justify the use of a sole source.
- (b) The County requires goods or services for potential or pending litigation, condemnation, or collective bargaining.
- (c) A contractor or subcontractor has been specifically identified in a grant accepted by the County.
- (d) A proposed contractor has been identified in a grant resolution approved by the Council.

4.1.12.4 Contents

A non-competitive procurement must contain, at a minimum, the following documentation:

- (a) A contract which includes specifications reflecting the minimum valid needs of the County. The specifications must be narrowly drawn so as not to exceed the reason which justifies the non-competitive award.
- (b) A memorandum from the Using Department Head to the Director which contains a full explanation and justification for the non-competitive procurement.

4.1.13 Standardized Procurements

4.1.13.1 General

A standardized procurement is a purchase of goods that the CRC determines to be equipment for which standardization and interchangeability of parts is necessary or is otherwise in the public interest. A standardized procurement should include competition when reasonably available. Standardization approval must be for a stated period which bears a reasonable relationship to the life of the equipment and the specialized training or specialized equipment necessary to service and maintain the standardized item. A standardization decision includes a decision to procure compatible parts, equipment, services, and training.

4.1.13.2 Use

Standardization may be used when:

- (a) Goods will be purchased repetitively over a period of time which will require or affect compatibility purchases over an extended period of time.
- (b) Standardization will appreciably reduce the variety and quantity of parts that must be carried in stock in order to properly maintain the equipment.

- (c) Standardization will produce demonstratable savings in training personnel or in acquiring technical literature and enhance the expertise of personnel in the use or maintenance of the standardized equipment.
- (d) The compatibility of the standardized equipment will permit joint or coordinated operational use by and between diverse departments, agencies, or jurisdictions.
- (e) Existing equipment, systems or inventories are compatible only with the standardized equipment, parts or services to be procured.
- (f) A continuous series of procurements of standardized equipment or parts over a period of time is advantageous, as demonstrated by cost-benefit analysis or similar analysis, because of considerations of training, replacement parts, compatibility with existing capital investments, and other standardization cost benefits.

4.1.14 Public Entity Procurements

4.1.14.1 General

A public entity procurement is an agreement to acquire or use any goods, services, or construction with a public entity upon terms and conditions considered to be in the best interest of the County as determined by the Director. A public entity procurement does not require public solicitation, nor does it require justification as a non-competitive procurement.

4.1.14.2 Use

A public entity procurement is used when it is in the best interest of the County to obtain goods, services, or construction from those available within the public sector. Among the factors to be considered in determining whether a public entity procurement is in the best interest of the County is the cost effectiveness of the proposed procurement.

4.1.14.3 Authority

Public entity procurements are prepared by the Using Department and issued by the Director.

4.1.15 Bridge Contracts

The Director may, without competition, enter into a bridge contract with a person if the Director determines that:

- 4.1.15.1 The person has an existing contract with another public entity for goods, services, or construction that the County would like to procure;
- 4.1.15.2 A bridge contract is in the best interest of the County; and
- 4.1.15.3 **the** contract between the person and the other public entity was awarded as a result of adequate competition.

The bridge contract must provide the County with materially the same goods, services, or construction being provided the other public entity at the same prices being charged the other public entity. Under extraordinary circumstances, the Director may approve a bridge contract for professional services.

4.2 Contract Types

4.2.1 Fixed Price

- 4.2.1.1 A fixed price contract is a contract that provides for a firm price under which a contractor bears the full responsibility for profit or loss. This does not include a cost reimbursement contract. All costs involved have been firmly established, in writing, but may be subject to certain adjustments, objectively defined. Such adjustments may include escalator clauses, incentive clauses, and other adjustment mechanisms. Construction contracts are generally fixed price contracts.

- 4.2.1.2 A fixed price contract is the preferred contract method in the County.

4.2.2 Cost Reimbursement Contracts

- 4.2.2.1 Cost reimbursement contracts are contracts which provide for reimbursement of a contractor's costs associated with performance of specified contract requirements and a fee if any. These costs may include hourly rates associated with personnel, overhead, out-of-pocket costs, and other costs specified in the contract. For purposes of these regulations, a time and material contract is considered a cost reimbursement contract. The contract must provide a means for ensuring that the costs are fair and reasonable. These means may include a requirement that the contractor document competition. The County has the right to review and approve costs before authorizing reimbursement.
- 4.2.2.2 A contract must not provide for compensation to be based on cost plus a percentage of cost of the work performed. A contractor must not be financially rewarded for increased costs that are passed on to the County. A contract, however, may provide for reimbursement based upon a cost plus a fixed fee provision or on a compensation provision that rewards the contractor for efficiency by providing for incentive payments.

4.2.3. **Requirements Contracts.**

- 4.2.3.1 A requirements contract is a contract for an indefinite quantity of goods, construction, or services to be furnished at specific times, or as ordered, at fixed unit prices. During the term of a requirements contract, the County should use reasonable efforts to order all actual requirements of designated Using Departments (or of the entire County) during a specified period of time. Failure to utilize a specific requirements contract for a particular procurement must not be considered a breach of the contractual obligation unless the contract specifically provides that the contractor is the exclusive source for the requirements.
- 4.2.3.2 Requirements contracts are administered by the Director as a fixed price source of supply which may be utilized by Using Departments through a delivery order issued by the Director. When deemed appropriate, the Director may authorize Using Departments to issue orders directly to the contractors involved. A delivery order must be supported by an encumbrance before it is issued.

4.2.3.3 Where practical, a requirements contract should include a maximum contract amount.

4.2.4 **Definite Quantity Contract**

A definite quantity contract is a contract that provides delivery of a specified quantity of goods, construction, or services either at specified times or when ordered. Quantities ordered under a definite quantity contract are limited to the quantity stated in the contract, unless the contract contains an increased quantity option.

4.2.5 **Multiple Award Contracts**

A multiple award contract is one in which more than one contractor is awarded a contract for specified goods, construction, or services. Use of this contract type is subject to approval of the Director. It may take one of the following forms:

4.2.5.1 **Geographic Distribution Awards**

Geographic distribution awards are contract awards made to separate contractors of goods, construction, or services in separate identifiable geographic areas, when such awards are justified by need for adequate delivery, service, availability, distribution of County contract work, or product compatibility.

4.2.5.2 **Multiple Source Contracting**

(a) **This** is contracting where the primary source is one specified contractor and secondary, tertiary, etc. sources perform as backup contractors. In this type of contract, the primary contractor receives all orders for goods or services. The backup contractor (secondary, tertiary, etc.) receives orders only after the primary contractor either fails to deliver under specified conditions in the contract or a specified quantity limit has been ordered from the primary contractor, as specified in the contracts.

(b) **Distribution Contracts**

These are multiple award contracts which are made for the purpose of distributing orders for particular services or

goods among several contractors. Each of these contracts specifies a maximum quantity of goods or services after which the next designated contractor receives orders, on a rotating basis.

(c) **Product Need/Compatibility Multiple Awards**

These awards are made to several vendors to ensure availability of specific goods or services to meet the needs of Using Departments.

4.2.6 **Multi-Year or Term Contracts**

Multi-year or term contracts may be authorized by the Director when it is appropriate to obtain uninterrupted services extending over more than one year or contract term, when the performance of services involves high start-up costs, when a continuous source of supply over a multi-year or term period is required, or when a change-over of services involves high phase-in/phase-out costs during a transition period. These multi-year or term contracts take the following forms and may be authorized under the following conditions:

4.2.6.1 **Options to extend contracts**

Contracts entered into with an original term subject to extension options must be funded with authorized appropriations, as certified by the Director of Finance, for the original term before execution. Thereafter, each option term must be similarly funded before the option may be exercised.

4.2.6.2 **Original long term contracts**

Original long term contracts are contracts involving a multi-year or term without need for renewal. A multi-year or term contract may be entered into only if sufficient funds are appropriated, and certified by the Director of Finance, sufficient to defray the amount of the first term of the contract. In addition, these contracts may be entered into only upon the following conditions:

- (a) The Using Department furnishes to the Director sufficient written documentation to demonstrate that the requirements

contained in the multi-year or term contract are reasonably firm and are continuing over the term of the contract. In addition, the Using Department must furnish sufficient documentation to the Director to demonstrate that the contract is in the best interest of the County because it encourages effective competition or promotes economies in performance and operation.

- (b) Based upon the documentation submitted, the Director determines that the multi-year or term contract is appropriate after being satisfied that the requirements contained in the contract are reasonably firm and continuing over the term of the contract and that the contract will serve the best interests of the County by its encouragement of effective competition or its promoting economies in contract performance and operation.
- (c) The contract must also include a termination provision which provides that in the event funds for terms subsequent to the first term are not appropriated and available for encumbrance for the subsequent years of the contract, the contract may be terminated by the County without further County liability to the contractor.

4.2.7 Incentive Contracts

4.2.7.1 General.

Each Using Department should consider the use of an incentive contract. An incentive contract is appropriate when the required goods, services or construction can be acquired at lower costs or, in certain instances, with improved delivery or technical performance, by relating the amount payable under the contract to the contractor's performance. Incentive contracts are designed to obtain specific acquisition objectives by:

- (a) establishing reasonable and attainable targets that are clearly communicated to the contractor; and
- (b) including appropriate incentive arrangements designed to motivate contractor efforts that might not otherwise be

emphasized and discourage contractor inefficiency and waste.

An incentive contract, however, should not operate to reward a contractor for performance results when the cost of those results outweighs their value to the County. Any amount paid as an incentive must be reasonably related to the additional costs of enhanced performance by the contractor or to the value of the enhanced performance received by the County.

4.2.7.2 Types of incentive contracts.

- (a) A cost reimbursement incentive contract is a contract which provides for reimbursement to the contractor for allowable costs incurred up to a ceiling amount and establishes a formula by which the contractor is rewarded for performing at less than an estimated target cost or exceeds specified performance standards such as time of delivery of contract performance; the contract may provide that the contractor is subject to reduced compensation or specified damages if it exceeds a target cost or fails to meet specified performance standards such as time of delivery of contract performance.
- (b) A fixed-price incentive contract is a fixed-price contract in which the parties establish at the outset a target for performance and a formula by which the contractor is rewarded for exceeding performance and may be subject to reduced compensation or specified damages if the performance is not met.

5. USING DEPARTMENT RESPONSIBILITIES

5.1 General

Using Departments are responsible for assuring that procurement actions are consistent with the policies of the County. These policies include Public Ethics (see Chapter 19A, Montgomery County Code and Ethics, Section 16 in these regulations) and MFD Contracting (see Section 7 of these regulations).

5.2 Specifications

Using Departments must write specifications in such a manner as to encourage competition and to avoid limitation of competition, balanced with the need to serve the public interest. Particular attention should be given by the Using Department to avoid the creation of artificial barriers to participation of MFD firms in the procurement process.

5.3 Payment Provisions

Payment provisions should provide for objective criteria or "benchmarks" for payment against certain performance events (e.g., payment after delivery and submittal of invoice; 25% payment after completion of foundation work, etc.) Partial payments may not exceed the reasonable value of the performance which entitles the contractor to that partial payment, unless an advance payment is approved.

5.4 Fiscal Responsibilities

- 5.4.1 The Using Department is responsible for ensuring that there is a sufficient expenditure authority to cover the entire contract amount, or in the case of a multi-year or term contract, the amount of the first period of a multi-term contract, and each subsequent period of the contract as it occurs.
- 5.4.2 The Using Department is responsible for providing documents sufficient to enable the Director of Finance to certify to the Director that there is an unencumbered balance in the appropriation sufficient to defray the amount of the contract at the time of execution, and in the case of a multi-year or term contract, the amount of the first period and each subsequent period of the contract as it occurs.
- 5.4.3 The Using Department is responsible for all payment authorizations and coordinations required to obtain prompt payment for the contractor as required by the contract. In connection with these payment certifications,

the Using Department is responsible for ascertaining and certifying that the contractor has performed in accordance with the contract requirements and has earned all contract payments certified to the Department of Finance. The Using Department is also responsible for inspection of goods and acceptance of goods or services prior to certification of payment to the Division of Accounts. The Using Department may not certify for payment invoices containing more hours than actually worked, payment provisions different than that contained in the contract, or charges against a contract different from that under which performance was rendered.

- 5.4.4 In contracts providing for release or reduction of retention, the Using Department may not process a certification for payment of the retention unless all conditions for payment are satisfied and the Director has approved the payment, in writing.

6. CONTRACTOR QUALIFICATIONS

6.1 Pre-qualifications

6.1.1 General

In general, the County does not provide for pre-qualification of offerors or providers of services except as enumerated below or otherwise provided in these regulations.

6.1.2 Bidder's List

6.1.2.1 The Director maintains a bidder's list. It is County policy to invite all interested parties to submit a written request to be placed on the bidder's list for their products or services. The written request should include the:

- (a) Prospective offeror's name and address;
- (b) Goods or services offered; and
- (c) A statement of whether the firm seeks to qualify as an MFD contractor, including all required documentation.

6.1.2.2 The fact that a potential offeror is on the bidder's list does not establish the qualification of that offeror for the offering of any particular goods or services. Furthermore, the fact that the offeror is on the list does not preclude disqualification or rejection for lack of responsibility. The Director is under no obligation to engage in any review of the prospective offeror's qualifications or stated areas of interest; however, the Director may remove a potential offeror from the bidder's list upon determination of lack of responsibility for the area of interest indicated or upon determination of disqualification. Further, the Director may, as appropriate, remove potential offerors from the bidder's list when (A) the offeror has failed to respond to three successive solicitations, (B) the offeror has been on the list for two years without response, or (C) other circumstances exist to indicate that the offeror is not expected to respond to solicitations.

6.1.2.3 A potential offeror may respond to any solicitation,

whether or not that offeror is on the bidder's list. The bidder's list is merely a mechanism for encouraging competition and ensuring wide dissemination of a solicitation document, but may not be construed as an exclusive prerequisite for responding to any solicitation.

6.2 Responsiveness; Minor Irregularity; Mistake in Bid

- 6.2.1 An offer that is determined to be non-responsive is rejected and must not be considered further in connection with the IFB unless specifically authorized under the competitive negotiation process. The determination of whether an offeror is responsive is made by the Director. When appropriate, the Director should solicit technical comments from the Using Department and consult with the Office of the County Attorney.
- 6.2.2 In determining responsiveness, the Director must consider, among other factors, the following:
 - 6.2.2.1 Conformance with the terms and specifications of the IFB;
 - 6.2.2.2 The nature and scope of conditions attached to the bid or proposal by the offeror;
 - 6.2.2.3 Whether the deviation or failure to conform pertains to a material part of the solicitation; or
 - 6.2.2.4 Any other deviations contained in the bid.
- 6.2.3 The Director may give an offeror an opportunity to cure any deficiency resulting from a minor irregularity in a bid or waive the deficiency, whichever is to the advantage of the County. The decision of the Director with respect to whether a defect is a minor irregularity is made in the sole discretion of the Director and is not subject to review.
- 6.2.4 If the Director knows or has reason to conclude that a mistake has been made, the Director may require a bidder to confirm the contents of a bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges a mistake, the Director may take the following actions which must be based on a written determination and finding:

6.2.4.1 If the mistake and the intended correction are clearly evident on the face of the bid, the bid must be corrected and may not be withdrawn. Examples of mistakes that are clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.

6.2.4.2 A bidder may be permitted to withdraw a low bid if:

- (a) A mistake is clearly evident on the face of the bid but what was intended is not similarly evident; or
- (b) The bidder submits objective proof that clearly and convincingly demonstrates that a mistake was made.

6.2.4.3 If the Director determines that no mistake was made, the bid may not be withdrawn.

6.2.5 When a Using Department Head is authorized to make a procurement (i.e. direct purchase), the Using Department Head is authorized to make the determination of responsiveness in the place of the Director pursuant to the criteria enumerated above.

6.3 Responsibility

6.3.1 The reputation, past performance, business and financial capability and other factors determine the responsibility of an offeror and the capability of the offeror to satisfy government's needs and requirements for a specific contract. The offeror has the burden of demonstrating affirmatively its responsibility in connection with a particular solicitation. The Director must determine whether an offeror is responsible for a particular prospective contract. A debarred potential offeror must automatically be considered non-responsible in connection with any particular solicitation.

6.3.2 The factors that may be considered in connection with a determination of responsibility include:

6.3.2.1 The ability, capacity, organization, facilities, and skill of the offeror to perform the contract;

- 6.3.2.2 The ability of the offeror to perform the contract or provide the services within the time specified without delay, interruption or interference;
- 6.3.2.3 The integrity, reputation and experience of the offeror, and its key personnel;
- 6.3.2.4 The quality of performance of previous contracts or services for the County or other entities. Past unsatisfactory performance, for any reason, is sufficient to justify a finding of non-responsibility;
- 6.3.2.5 The previous and existing compliance by the offeror with laws and ordinances relating to the contract or services;
- 6.3.2.6 The sufficiency of financial resources of the offeror to perform the contract or provide the services;
- 6.3.2.7 The certification of an appropriate accounting system, if required by the contract type. Advice should be obtained from the Department of Finance as to the accounting system required for the particular solicitation; and
- 6.3.2.8 A bid bond and the offeror's evidence of ability to furnish a performance bond may be considered in an overall determination of responsibility.
- 6.3.2.9 Past debarment by the County or other entity.
- 6.3.3 The Director may deny an award or modification of a contract to any offeror who is in default of payment of any money due the County.
- 6.3.4 Solicitations in which Using Departments make recommendations for awards to the Director must include a written recommendation with respect to the responsibility of the potential awardee. The Using Department should specify in detail the factual basis for its recommending a finding of responsibility of the potential awardee. In connection with this recommendation, the Using Department should review its files and the central performance file of the Office of Procurement with respect to the performance of the prospective awardee in previous contracts in the Using Department and the County, investigate performance of the prospective awardee in other contracts with the County and other entities to the extent

practical, and ensure that the recommended awardee is not on a current Montgomery County suspension or debarment list.

- 6.3.5 Prospective offerors have the burden to demonstrate affirmatively their responsibility. An offeror may be requested at any time by the Director or the Using Department to provide additional information, references and other documentation and information that relate to the determination of responsibility. Failure to furnish requested information may constitute grounds for a finding of non-responsibility of the prospective offeror.
- 6.3.6 When a Using Department is authorized to make a procurement (i.e., direct purchase), the Using Department Head is authorized to make the determination of responsibility in the place of the Director pursuant to the criteria enumerated above.

7. MINORITY OWNED BUSINESS CONTRACTING

7.1 Purpose

The purpose of Section 7 is to establish procedures to facilitate the goal of the County Government to remedy the effects of discrimination by awarding a percentage of the dollar value of County contracts, including contract modifications and renewals, over \$5,000 to minority owned businesses (MFD owned business or MFD) as defined in Chapter 11B of the County Code in proportion to the availability of MFD owned businesses to perform work under County contracts.

7.2 Policy

- 7.2.1 The Director, with the assistance of Using Departments and employees involved in contracting and purchasing, must actively and aggressively recruit certified MFD owned businesses to provide goods, construction, and services, including professional services, for the performance of governmental functions to facilitate the MFD goal of the County. Procurements under \$5,000, grants that are appropriated by the County Council to specific grantees, utilities, intragovernmental procurements, and certain intergovernmental procurements including certain bridge contracts identified by the Director are excluded from the base against which the goal is measured.
- 7.2.2 Businesses that are certified as a minority business enterprise under State procurement law and certain non-profit entities organized to promote the interests of persons with a disability are eligible to be certified as an MFD business in accordance with these regulations. Certification is subject to the graduation provisions of Section 7.4.5.
- 7.2.3 These regulations are the County's exclusive procedure for the certification, recertification and decertification of MFD owned businesses.
- 7.2.4 Using Department Heads should seek the advice and concurrence of the Director in the development of internal operating procedures to implement the provisions of this procedure.

7.3 General

- 7.3.1 In Section 7 the term Washington, D.C. - Baltimore Consolidated Metropolitan Statistical Area has the same meaning as it has in Chapter 11B. The term MFD group or group of MFD owned businesses has the

same definition as socially or economically disadvantaged group in Chapter 11B.

7.3.2 To qualify to participate in the MFD subcontracting program under Section 7.3.3, an MFD owned business must:

7.3.2.1 belong to an MFD group for which a goal has been set under Section 7.3.4 in the purchasing category covering the work that is the subject of the subcontract; and

7.3.2.2 be certified as an MFD owned business under Section 7.4.

7.3.3 MFD Subcontracting Program.

7.3.3.1 Unless the context indicates otherwise, in Section 7,

(a) contract means a contract identified by Using Departments or the Director as having an estimated dollar value of \$65,000 or more, including renewals; and

(b) contractor means a contractor that:

(1) is not a certified MFD owned business; or

(2) if the contractor is a certified MFD owned business, the contractor does not belong to an MFD group for which a goal had been set in the purchasing category covering significant work to be undertaken in the contract.

7.3.3.2 A contractor must subcontract a minimum percentage (as determined by the Director) of the contract price to certified MFD owned businesses that are eligible to participate in the subcontracting program. To be eligible, a certified MFD owned business must have a goal set under Section 7.3.4 in a purchasing category covering the work to be performed under the subcontract. The Director applies the goals established by the CAO under Section 7.3.4.8(d) for each purchasing category covering a substantial amount of work to be done under the contract to set the minimum percentage of the contract which the contractor must subcontract to certified MFD owned businesses.

7.3.3.3 Each contractor must submit a Subcontractor Performance Plan prior to undertaking performance under the contract, or at such earlier time as required by the Director. An MFD Subcontractor Performance Plan must:

- (a) identify each MFD subcontractor;
- (b) identify the amount the contractor has agreed to pay each MFD subcontractor;
- (c) provide a copy of the language used in each MFD subcontract which requires the use of binding arbitration with a neutral arbitrator to resolve disputes between the contractor and the MFD subcontractor. The language must describe how the costs of dispute resolution will be apportioned; the apportionment must not, in the judgment of the Director, attempt to penalize an MFD subcontractor for filing an arbitration claim; and
- (d) be made a part of the contract between the contractor and the County. County approval of the Subcontractor Performance Plan must not establish a contractual relationship between the County and the MFD subcontractor.

7.3.3.4 The contract between the contractor and the County must require:

- (a) the contractor to notify the Director of any proposed change to the Subcontractor Performance Plan;
- (b) the contractor to provide in each subcontract with an MFD owned business a provision requiring the use of binding arbitration to resolve disputes between the contractor and the MFD owned business;
- (c) that failure to submit documentation showing compliance with the Subcontracting Performance Plan is grounds for imposing liquidated damages unless failure to comply with the Plan is the result of an arbitration decision in favor of the contractor or a waiver granted by the Director. Liquidated damages under this provision should equal the

difference between all amounts the contractor has agreed under its plan to pay MFD subcontractors and all amounts actually paid MFD subcontractors considering any relevant waiver or arbitrator's decision; and

- (d) that failure to show compliance with a Subcontractor Performance Plan must result in finding the contractor nonresponsible for purposes of future procurements with the County during the next 3 years.

7.3.3.5 The Director may waive in whole or in part an MFD subcontracting requirement imposed under Section 7.3.3 if the Director finds that:

- (a) it is unusually difficult or impossible for the contractor to meet a subcontracting requirement because, for example, a qualified MFD owned business is not available for subcontracting or the contractor's good-faith efforts to subcontract with available MFD owned businesses have failed;
- (b) reasonable grounds exist to waive a subcontracting requirement because, for example, the subcontracting requirement would undermine the purpose of a contract for personal services, subcontracting would be inconsistent with requirements for confidentiality, or the contract is awarded under an emergency procurement; or
- (c) the contractor belongs to a class of nonprofit entities for which the Director has determined that it would be impractical to require participation in the MFD Subcontracting Program.

7.3.3.6 The Director has sole discretion to determine the estimated value of a contract and may consider the value of any modifications or renewals.

7.3.4 The MFD subcontracting goal is set as follows:

7.3.4.1 By September 1 of each year the Director must determine for the previous fiscal year the availability of each group of MFD owned businesses with one or more employees. The Director must use

the latest available federal economic census data, or other reliable means of measuring availability, to determine the availability of MFD owned businesses in the Washington D.C. - Baltimore Consolidated Metropolitan Statistical Area to perform work under County contracts.

- 7.3.4.2 Fiscal year means July 1 through June 30.
- 7.3.4.3 The Director must state the availability for each group of MFD owned businesses as a percentage of all available businesses in the purchasing categories of:
 - (a) construction;
 - (b) goods;
 - (c) professional services; and
 - (d) other services
- 7.3.4.4 The Director may set the availability of Disabled owned businesses at 0.75 percent in each purchasing category. Not for profit entities that are certified as MFD owned businesses are included in the Disabled owned business group.
- 7.3.4.5 The Director must determine the percentage of contract dollars awarded to each group of MFD owned businesses as prime contractors and subcontractors in the purchasing categories of:
 - (a) construction;
 - (b) goods;
 - (c) professional services; and
 - (d) other services.
- 7.3.4.6 The Director must determine the disparity between the dollar value of contracts and subcontracts awarded to each group of MFD owned businesses in each purchasing category identified in Section 7.3.4.5 with the availability of that group in each purchasing category. The Director must use, to the extent

practicable, a methodology compatible with the methodology used to determine disparity in the Minority, Female, Disabled Disparity Study dated November 26, 1996.

- 7.3.4.7 By September 1 of each year the Director must submit to the CAO a report setting forth the determinations made under Sections 7.3.4.3 through 7.3.4.6.
- 7.3.4.8 After receiving the Director's report, the CAO must set by September 30 of each year MFD subcontracting goals for the period beginning on October 1 and ending on September 30.
- (a) In setting MFD subcontracting goals the CAO must determine if the County has significantly underutilized each group of MFD owned businesses in each purchasing category. The CAO makes this determination by considering the disparity between the availability of each group of MFD owned businesses in each purchasing category with the contract dollars awarded to each group of MFD owned businesses in each purchasing category.
 - (b) If the CAO determines that a group of MFD owned businesses in a specific purchasing category has been significantly underutilized, the CAO must set an MFD goal for that group in the applicable purchasing category. The goal must be related to the availability of the group of MFD owned businesses in the purchasing category.
 - (c) If the CAO determines that a group of MFD owned businesses in a specific purchasing category has not been significantly underutilized, the CAO must not set an MFD goal in the applicable purchasing category. The CAO, nevertheless, may set a goal for an MFD group in a purchasing category (even though a finding of significant underutilization has not been found) if, in at least one out of the last 4 years, the CAO had determined the MFD group had been significantly underutilized and during that year a goal had not been set for the MFD group in the applicable purchasing category.
 - (d) The CAO must set for each purchasing category for which an MFD goal has been set an overall MFD subcontracting

goal that contractors must meet under Section 7.3.3. The overall MFD subcontracting goal for each purchasing category must be related to the availability of all groups of MFD owned businesses for which a goal is set in that purchasing category.

7.4 Certification of MFD Owned Businesses

7.4.1 The Director may certify an entity as an MFD owned business if the business is certified as a minority business enterprise under State procurement law except for a not for profit entity organized to promote the interests of physically and mentally disabled individuals. In the case of a not for profit entity, the Director must determine that:

7.4.1.1 the not for profit entity is certified as a minority business enterprise under State procurement law; and

7.4.1.2 at least 51% of the individuals used by the not for profit entity to perform the work or manufacture the goods contracted for by the County are individuals with a physical or mental disability.

7.4.2 The Director must conduct a review to determine whether a business may be certified as an MFD owned business. This review must include an evaluation of the documentation submitted by the business on an MFD Application form. The Director may also include a site visit to the offices of a not for profit entity. The Director may review any of the following:

7.4.2.1 Certifications issued by the State.

7.4.2.2 Employment records, health records, and/or educational records of the employees of a not for profit entity seeking MFD certification.

7.4.2.3 Other relevant information concerning the operation of a not for profit entity.

7.4.3 A request for certification or recertification as an MFD business may be denied by the Director for any of the following reasons:

7.4.3.1 Failure to demonstrate that the business is a certified minority business enterprise under State procurement law.

- 7.4.3.2 Failure to provide sufficient and timely information for the Director to make a certification or recertification determination.
- 7.4.3.3 Refusal to permit an on-site inspection by the Director.
- 7.4.3.4 Failure to comply with a request by the Director for information or access to records.
- 7.4.3.5 Graduation of the MFD owned business.
- 7.4.4 Certification as an MFD owned business by the County may be revoked for any one of the following reasons:
 - 7.4.4.1 Fraud, deceit or misrepresentation in obtaining certification.
 - 7.4.4.2 Failure to report in writing to the Director within 30 days of the date of the occurrence of any changes in the status of the certified MFD owned business which are relevant to its certification.
 - 7.4.4.3 Failure to demonstrate at the request of the Director that the entity continues to be an MFD owned business.
- 7.4.5 Certification is subject to the graduation provisions of this Section. The Director must not certify an entity as a MFD owned business for a period of time that exceeds 5 years. The Director, however, may certify a business as an MFD owned business for 8 years if during the first 5 years of certification, the MFD owned business:
 - 7.4.5.1 has not received at least
 - (a) 4 subcontracts awarded under Chapter 11B of the County Code; and
 - (b) the cumulative value of the subcontracts has not exceeded \$120,000.
 - 7.4.5.2 The MFD graduation requirement established under this subsection begins on December 1, 1993, and is only effective prospectively.

7.5 Responsibilities

7.5.1 Director

- 7.5.1.1 The Director is responsible for contacts with businesses to identify, encourage and coordinate participation of MFD owned businesses in the procurement process, including certification. This includes notification to MFD owned businesses of prospective procurement opportunities by telephone or mailings based on the most recent MFD owned business Directory, encouragement of MFD owned business participation in procurement, as prime contractors or subcontractors, procurement system education and information for MFD owned businesses, and referrals to resources such as technical consultants, sureties and financing.
- 7.5.1.2 The Director maintains up-to-date mailing lists, and other references of County certified MFD owned businesses for use by Using Departments, contractors, and for public information.
- 7.5.1.3 The Director provides Using Departments with a list of certified MFD owned businesses who have stated an interest in providing services required by the Using Department.
- 7.5.1.4 The Director assists Using Departments, as needed, in developing internal operating procedures to use certified MFD owned businesses in accordance with the provisions of this section.
- 7.5.1.5 The Director cooperates with other governments and governmental agencies in exchanging information regarding certified MFD owned businesses.
- 7.5.1.6 The Director distributes to non-minority prime contractors a current list of certified MFD owned businesses with a requirement that one or more be contacted if the work is being subcontracted.
- 7.5.1.7 The Director should ensure that contract administrators receive appropriate guidance in implementing the provisions of these regulations.

7.5.2 Using Departments

- 7.5.2.1 The Using Departments should request and use the most recent list of certified MFD owned businesses furnished by the Director to encourage certified MFD owned business response to Requests for Proposals and Requests for Expressions of Interest and all other procurements.
- 7.5.2.2 When inviting proposals for services with a dollar value of less than \$65,000, whether by RFP, REOI, Mini-Contract or any other form of procurement, the Using Departments must ensure an effort is made to afford certified MFD owned businesses an opportunity to participate in the award of the contract. Periodically, or at the request of the Director, Using Departments must provide to the Director written documentation including contract documents that indicate the results of efforts to provide an opportunity for certified MFD owned businesses to submit proposals. The Using Departments should also cooperate with the Director in efforts to encourage MFD contractor participation by, among other things, establishing minority business procurement objectives consistent with Chapter 11B of the County Code and by developing and implementing techniques to encourage greater MFD owned business participation.
- 7.5.2.3 The Using Departments must notify the Director when an Invitation For Bid, a Request for Proposal or a Request for Expression of Interest is expected to have a dollar value of \$65,000 or more. Notification should be as early as possible but not later than the Using Department's official request to the Director to commence a procurement action.
- 7.5.2.4 The Using Departments should develop, with the advice and concurrence of the Director, internal operating procedures to implement the provisions of this section.

7.6 Procedures for Certification/Recertification of MFD Businesses

- 7.6.1 The Director, upon request from a business or at the Director's initiative, provides a MFD Application form to the business. To ensure timely recertification, the certified MFD owned businesses should file a MFD Application form at least 60 days prior to expiration of certification.
- 7.6.2 The business returns the MFD Application form to the Director in accordance with the form's instructions.

- 7.6.3 The Director reviews the MFD Application form submitted to determine, in accordance with this procedure, whether the business should be certified or recertified as an MFD owned business. Upon determination of eligibility as a MFD owned business, the Director certifies the business as an MFD owned business.
- 7.6.4 If a business is not certified or recertification is denied, the Director informs the applicant, in writing, of the denial, the reasons for denial and the right to request reconsideration of the decision to the Director within 5 days of the date of the decision. This notice of denial should indicate that the business may request a hearing.
- 7.6.5 The Director reviews the request for reconsideration and may conduct a hearing if appropriate. The Director makes a written determination and finding regarding the reconsideration request. The Director must then send a copy of the decision to the CAO who may approve, revise, or remand the decision. If the CAO takes no action within 5 working days, the decision of the Director becomes final.
- 7.6.6 After the decision becomes final, the Director must inform the business making the reconsideration request, in writing, of the decision and the right to appeal to the Circuit Court for Montgomery County, Maryland, pursuant to Title 7 of the Maryland Rules of Procedure governing judicial review of decisions of administrative agencies.

7.7 Procedures for Decertification

- 7.7.1 The Director, based upon a written determination that there are grounds for concluding that the entity is no longer entitled to be certified as an MFD owned business, makes a proposal to revoke the certification. The entity must be notified, in writing, of this proposed decertification.
- 7.7.2 The entity may submit any written information to the Director within the time limits specified by the Director, which must not be less than 3 working days of receipt of notification of the proposed decertification.
- 7.7.3 The Director must review the proposed decertification and any information submitted by the entity and decide whether to revoke the certification after the expiration of the time specified by the Director for submitting information. The Director must inform the entity of the decision, in writing, and the right to request a reconsideration of the decision within 5 days.

- 7.7.4 The entity must submit to the Director a written reconsideration request regarding the decertification within the 5 day limit or waives all rights of appeal.
- 7.7.5 If there is a reconsideration request, the Director may conduct a hearing, if appropriate, concerning the decertification. The Director makes a written determination and finding regarding the decertification request. The Director must then send a copy of the decision to the CAO who may approve, revise, or remand the decision. If the CAO takes no action within 5 working days, the decision of the Director becomes final.
- 7.7.6 After the decision becomes final, the Director must inform the entity making the reconsideration request, in writing, of the decision and the right to appeal to the Circuit Court for Montgomery County, Maryland, pursuant to Title 7 of the Maryland Rules of Procedure governing judicial review of decisions of administrative agencies.

7.8 Special Solicitation Requirements

- 7.8.1 The Director must include in all formal competitive solicitations (and resulting contracts) with an estimated value of \$65,000 or greater MFD contracting conditions in a form created by the Director and approved by the Office of the County Attorney.
- 7.8.2 These conditions must include the following provisions:
 - 7.8.2.1 Notice of the Montgomery County MFD contracting policy and associated contracting goals.
 - 7.8.2.2 A requirement that the offeror subcontract with certified MFD owned businesses in a manner consistent with Section 7.3.3, and how the offeror may demonstrate the basis for the Director to grant, in whole or in part, a waiver of the MFD subcontracting goal.
 - 7.8.2.3 Notice of the requirement to comply with the MFD Subcontractor Performance Plan, including binding arbitration to resolve disputes with MFD subcontracts and imposition of liquidated damages for failure to comply with the MFD Subcontractor Performance Plan.

- 7.8.2.4 A specification of all documentation required to be submitted by the contractor, including information required under Section 7.9 which the Director requires the contractor to submit, and time requirements for those submissions as determined by the Director.
 - 7.8.2.5 Notice of non-eligibility and disqualification for award for failure to submit required documentation or meet MFD goals, unless waived.
 - 7.8.2.6 Limitations on substitutions or other non-use of designated MFD subcontractors.
 - 7.8.2.7 Notice of enforcement procedures, including penalties and actions which may result from non-compliance.
 - 7.8.2.8 Statement of records requirements for contractors, including types of records required and length of time the records must be maintained.
- 7.8.3 The Director must review and evaluate procurement procedures and solicitation requirements to determine the effect those procedures and requirements may have on the ability of MFD owned businesses to be competitive. The Director may also take necessary action to remove any artificial barriers to competition found to exist. Those actions may include:
- 7.8.3.1 Requiring Using Departments to take steps to assist contractors in making timely submissions of subcontracting plans.
 - 7.8.3.2 Considering past compliance with the County minority business procurement program in determining contractor responsibility.
 - 7.8.3.3 Adjusting evaluation criteria or method of award decisions and lowering or eliminating insurance, bonding and experience requirements.
 - 7.8.3.4 Requiring the minority procurement officer to report in writing to the Director those solicitations and contracts which adversely affect MFD participation and those actions by existing contractors which do not comply in good faith with approved MFD subcontractor plans.

7.9 Reporting Requirements

The Director may require each contractor to provide the County with information concerning utilization by the contractor of MFD owned businesses in private and government contracts. The Director may also require each certified MFD owned business to provide the County with information concerning its utilization by non-MFD owned businesses in private and government contracts.

7.10 Monitoring Procedures

- 7.10.1 The contract administrator in conjunction with the minority procurement officer must monitor all contracts subject to MFD participation to ensure compliance by prime contractors with the requirements of these regulations. Monitoring may include site visits, audits of contractors' books and records relative to County contracts, the submission of copies of invoices from the minority subcontractor to the prime contractor, submission of Contract Monitoring Reports at scheduled intervals during the life of the contract, and other procedures that the Director may require.
- 7.10.2 The Director must notify certified MFD owned businesses of their responsibility to report to the minority procurement office in a timely manner any changes in status that affects the entity's eligibility for certification as an MFD owned business. The failure of the MFD owned business to report any relevant change in a timely manner constitutes sufficient grounds for decertification.

8. CONTRACT PAYMENTS

8.1 General Payment Principles

- 8.1.1 All contracts must specifically provide for methods and timing of payments to be made to the contractor. These provisions should be as detailed as possible, specifying all conditions which must be met by the contractor in order to submit a request for payment and to determine whether a payment is due.
- 8.1.2 Except as otherwise authorized by these regulations, payment may be made only after contractor performance has occurred to justify the payments under the contract (e.g., the contractor has incurred a cost and submitted an invoice for an item for which the contractor appears to be entitled to cost reimbursement; the contractor appears to have performed services for which a fair value has been specified as a part of the contract; the contractor appears to be entitled to a progress payment in accordance with the contract upon determination of that extent of performance; goods have been delivered and inspected by the Using Department, appear to be acceptable, and an invoice has been submitted for payment in accordance with the contract).
- 8.1.3 Certifying whether payments are due the contractor is the responsibility of the Using Department and must be done as expeditiously as possible. The Using Department may be required to justify any failure to expedite payments upon inquiry by the Director.

8.2 Incentive Payments

Contracts may provide for incentive payments in exchange for enhanced contractor performance beyond contract specifications, terms and conditions.

8.3 Progress or Partial Payments

The approval and recommendation for payment by a Using Department of an invoice submitted by contractor for progress payments or partial payments pursuant to the terms of a contract constitute certification that a contractor has performed in accordance with the contract and has earned the payment approved, that the Using Department has performed all inspection necessary, including testing, to insure proper performance, and the Using Department accepts the contractor's performance as complying with the contract for purposes of earning the contract payment. Certification of approval for a progress or partial payment does not constitute waiver

of any rights of the County against the contractor for failure to perform pursuant to any of the terms, conditions, or specifications of the contract.

8.4 Advance Payments

A contract may provide for advance payment if the advance payment is part of a commercially acceptable practice as in the case of equipment and software maintenance, periodical subscriptions, registrations, travel, catering service, licensing fees, and insurance premiums. In other cases, the Director of Finance and the Director may approve an advance payment if they determine that unique circumstances exist which indicate that an advance payment is in the best interest of the County.

8.5 Retention

8.5.1 In contracts for which retention is provided (generally construction contracts), Using Departments must insure that all retention amounts provided for in the contract are maintained by the County. Partial reduction or final release of retention must be authorized, in writing, by the Director.

8.5.2 Any changes to levels of retention provided in the contract must be approved by the Director, in writing, before the change in the contract retention may become effective.

8.5.3 If a contractor has furnished 100% payment security and 100% performance security under a contract for construction, retainage must comply with the requirements established under the Maryland Little Miller Act.

8.6 Payment of Interest

If interest is payable by the County under Section 11B-34 of the Code, the amount of the interest is calculated by using the interest rate paid by 5 year U.S. Treasury Bills as of the date interest first begins to accrue under Section 11B-34.

8.7 Credit and Debit Card Procurements

Credit and debit cards may be utilized as authorized by the Director of Finance. The authorization of the Director of Finance must designate the following:

8.7.1 Each person authorized to use the credit card;

- 8.7.2 The monetary limits for any single expenditure and class of expenditures that may be incurred under the credit card;
- 8.7.3 An itemization or description of all allowable purchases;
- 8.7.4 A statement of all limitations with respect to use of the card;
- 8.7.5 A statement of any limitations with respect to date of usage of the card or duration of authorization.

9. BONDS AND INSURANCE

9.1 Bonds

9.1.1 Exemption from Bond Requirements

Bond requirements contained in these regulations are not applicable to public works participation agreements (e.g., stormwater agreements, road participation agreements) and other regulatory non-procurement agreements as designated from time to time by the County Attorney.

9.1.2 Director Review

9.1.2.1 The Director must review and approve the bond requirements in a solicitation:

- (a) for construction contracts that have a value of less than \$100,000; and
- (b) all non-construction contracts.

9.1.2.2 The Director in reviewing bond requirements should consider the impact on competition and costs, particularly impacts on MFD firms. The impacts must be balanced with the needs served by the bond requirements, which include appropriate security for performance and other assurances of responsibility.

9.1.3 Minimum Requirements

9.1.3.1 All bonds must meet the following minimum requirements:

- (a) The surety company issuing the bond must be qualified to do business in the State of Maryland.
- (b) The attorney-in-fact on the bond document must be properly authorized to bind the surety, which authorization may be documented by a power of attorney submitted with the bond, or the attorney-in-fact must be registered with the Circuit Court for Montgomery County, Maryland.

- (c) The obligee of the bond must be "Montgomery County, Maryland".

9.1.3.2 Under State law, a construction contract that exceeds \$100,000 must require the contractor to provide payment security in an amount equal to at least 50 percent of the total amount payable under the contract and for performance security in an appropriate amount. For construction contracts that exceed \$25,000, but do not exceed \$100,000, the Director may require payment security or performance security.

9.1.4 **Substitutions**

Substitutions for bonds may be permitted only with permission of the County Attorney or pursuant to guidelines issued by the County Attorney. Substitutions may include letters of credit, cash deposits and other forms of security. Personal sureties are generally not acceptable substitutes for bond requirements.

9.2 **Insurance**

General insurance requirements for contracts are specified by the Office of the County Attorney in the mandatory clauses. Requests for variances from those requirements must be approved by the Director. The Division of Risk Management, Department of Finance, must be consulted on all matters pertaining to insurance, particularly insurance amounts.

10. CONTRACT COST AND PRICING PRINCIPLES

10.1 Fair and Reasonable Price Determination.

Before executing a contract or contract modification, the Director must make a final determination that prices to be paid by the County are fair and reasonable. In making this determination, the Director should consider the Using Department's price analysis and, if obtained, cost or pricing data.

The Director has authority to require that contract cost or pricing principles be followed by Using Departments. In addition, the Director may require a price analysis by Using Departments, particularly in the certification of fair and reasonable prices as required by these regulations.

10.1.1 Price Analysis

Before making a recommendation for award, a Using Department must make a price analysis to determine that the prices are fair and reasonable. In making the price analysis, a Using Department should consider one or more of the following factors:

- 10.1.1.1 Prior award price for the goods or services being procured;
- 10.1.1.2 Prices contained in other offers responding to that solicitation;
- 10.1.1.3 Costs estimated for the procurement prior to the receipt of offers;
- 10.1.1.4 Commercial market prices and other commercial practices relating to costs;
- 10.1.1.5 Prices paid by other public entities for similar goods or services;
or
- 10.1.1.6 Cost analysis which separates components of the offer and allocates costs among those components.

10.1.2 The Director may issue additional factors to the Using Departments for use in making a price analysis.

10.3 Requirements for Certified Cost or Pricing Data

- 10.3.1 An offeror or contractor must submit cost or pricing data, or both, in a form prescribed by the Director prior to approval of:
 - 10.3.1.1 A competitively negotiated contract valued at more than \$100,000;
 - 10.3.1.2 A non-competitively negotiated contract valued at more than \$50,000;
 - 10.3.1.3 Any contract modification for which the price adjustment is expected to exceed \$50,000 except contract modifications that are fully in accordance with the terms and conditions of the contract; or
 - 10.3.1.4 Any other contract or contract modification, as may be required by the CAO or Director.
- 10.3.2 When Cost or Pricing Data is required:
 - 10.3.2.1 Each contractor or offeror must at the request of the Director submit, in a form required by the Director, a certificate showing the data for the proposed work to be done, including work to be done by a subcontractor. The offeror or contractor must submit a certification that the data submitted are accurate, complete and current.
 - 10.3.2.2 The contract or contract modification document must state that the price to the County, including profit or fee, may be adjusted by the Director to exclude from the price any sums determined by the Director to be allocable to inaccurate, incomplete or outdated cost or pricing data.
- 10.3.3 When a prime contractor is authorized to expend appropriated funds through subcontractors in the performance of a County contract, Subsections 10.3.1 and 10.3.2 are also applicable to subcontracts and subcontract modifications.
- 10.3.4 Before executing a contract or contract modification, the Director must make a determination as to the reasonableness of the cost or pricing data. The contract cost principles and procedures in the Federal Acquisition Regulations may be used as general guidelines when developing price determinations, if they are not at variance with County laws and regulations.

- 10.3.5 The requirements of section 10.3 do not apply to a contract or contract modification that is based on:
 - 10.3.5.1 Adequate competition as determined by the Director;
 - 10.3.5.2 Established catalog or market prices of commercial items sold in substantial quantities to the general public;
 - 10.3.5.3 Prices set by laws or regulations;
 - 10.3.5.4 A noncompetitive contract awarded under a resolution or appropriation approved by the County Council, if the Using Department has made the certification required by Section 17.3.2.; or
 - 10.3.5.5 The Contractor has been specifically identified in a grant accepted by the County.
- 10.3.6 In exceptional cases, or for contracts or contract modifications with public entities, the Director may waive the requirement for cost or pricing data by making a written determination that explains why the waiver is in the best interest of the County.

11. CONTRACT MODIFICATIONS

11.1 General

11.1.1 Authorization

Contract modifications may be initiated by the contractor, contracting officer, or the contract administrator. A contract modification is not effective, and a contractor must not proceed with performance under the modification, until and unless the contract modification is executed by the contracting officer.

11.1.2 Use - Special Circumstances

11.1.2.1 Under extraordinary circumstances, the Director may approve a contract modification:

- (a) for goods, services, or construction that has already been provided;
- (b) to a contract that has expired; or
- (c) to a contract that has been fully completed.

11.1.2.2 A contract modification may be used, among other things, to approve an equitable adjustment in the case of a unilateral change order. Subject to Chapter 20 of the County Code, a contract modification may be used to approve the settlement of a potential or pending contract dispute.

11.1.3 Policy for Contract Modifications that Change the Scope of a Contract

11.1.3.1 Contract modifications may not provide for less than full performance by the contractor as provided in the contract unless the contractor gives full and fair consideration (discount on contract price, additional work, etc.) in exchange for the contract modification. The County must not pay any additional monies under a contract modification for work which was required to be performed under the contract.

- 11.1.3.2 A modification to a contract that was awarded by a competitive solicitation process may not materially depart from the scope of the original solicitation unless the goods, services, or construction being acquired by the modification could be acquired from the incumbent contractor by a separate non-competitive or emergency procurement.

In the absence of a non-competitive or emergency procurement justification, the modification must be of a kind that potential offerors reasonably could have anticipated.

11.1.4 **Review**

- 11.1.4.1 The Director reviews the proposed contract modification, with attachments if any. If the value of the proposed contract modification exceeds the threshold for an IFB or RFP, the Director must refer the contract modification to the CRC unless the Director determines that the change in compensation results from a mechanical application of an established cost indexing provision or other contract option which pre-determines price. Otherwise, the Director may approve the modification.
- 11.1.4.2 The CRC reviews contract modifications referred by the Director. The CRC may approve, approve with conditions or reject any contract modification.

11.2 **Change Orders**

- 11.2.1 Change orders may be initiated as provided in the contract. Generally, a change order is initiated by the contract administrator. The change order may not become effective, and a contractor may not proceed with performance of the change order, until and unless the change order is executed by the contracting officer.
- 11.2.2 Changes which are outside the scope of the contract should not be processed in the form of a change order.
- 11.2.3 The Director reviews the proposed change order, with attachments. If the net cost of all the changes in the proposed change order exceeds the threshold for an IFB or RFP, the Director must refer the change order to the CRC for review. Otherwise, the Director may approve the change order.

- 11.2.4 The CRC reviews change orders referred by the Director. The CRC may approve, approve with conditions, or reject any change order in whole or in part.

11.3 **Field Orders**

- 11.3.1 Field orders are used only in the following limited situations:

- 11.3.1.1 To direct work when unforeseen and unanticipated conditions arise which require immediate action to mitigate costs or avoid delay claims, and there is insufficient time to process a change order;
- 11.3.1.2 To order a minor change in the work not involving an adjustment in the contract sum or an extension of the contract time, not inconsistent with the intent of the contract documents;
- 11.3.1.3 To provide a written interpretation, including drawings, necessary for the proper execution or progress of the work consistent with and reasonably inferable from the contract documents if the interpretation does not adjust the contract sum or the contract time.

- 11.3.2 A field order may be issued by a person specifically delegated the authority to issue a field order under the contract and who acts as a contracting officer for the purpose of issuing the field order. If the estimated value of the field order exceeds the threshold for an IFB or RFP, the Using Department Head must consent to the field order prior to its issuance. A Using Department Head may not delegate this authority to the authorized government official at the place of performance.

11.3.3 **Prohibited field orders**

Field orders are not permitted if there is sufficient time to process a change order, a contract amendment, or, if appropriate, a new procurement to satisfy the County's needs.

12. CONTRACT TERMINATION

12.1 Termination Methods

A contract may be terminated in three ways:

- 12.1.1 A contract may be terminated for default. If the contractor materially breaches the contract, the County, at its option, may cancel in whole or in part work under the contract. A termination for default is a termination for convenience if the termination for default is later found to be without justification.
- 12.1.2 A contract may be terminated for convenience at the option of the County if the termination is in the best interest of the County. Termination for convenience may entitle the contractor to payment for reasonable costs allocable to the contract for work or costs incurred by the contractor up to the date of termination. The contractor must not be paid compensation as a result of a termination for convenience that exceeds the amount encumbered to pay for work to be performed under the contract.
- 12.1.3 In special circumstances a contract may be terminated by mutual consent of the parties.

12.2. Authority to Terminate

Only the contracting officer may terminate a contract. The County Attorney must approve each contract termination.

12.3 Process to Terminate

12.3.1 Termination for Default

- 12.3.1.1 The Using Department must provide the contracting officer with documentation demonstrating a material breach of the contract by the contractor.
- 12.3.1.2 If the contracting officer finds that the contractor is in default, the contracting officer must provide the contractor with a written notice to cure the default. If the contracting officer determines that default contributes to the curtailment of an essential service or poses an immediate threat to life, health, or property, the contracting officer may terminate the contract immediately by

issuing an oral or written notice to the contractor without giving any prior notice or opportunity to cure.

12.3.1.3 The County Attorney must approve the issuance of the notice to cure and the issuance of a termination for default.

12.3.1.4 If the contractor disputes the issuance of a termination for default, the contractor must file a timely claim under Section 14.2. The contractor may not file a claim in response to a notice to cure.

12.3.2. Termination for Convenience

12.3.2.1 The Using Department must provide the contracting officer with documentation demonstrating that termination of the contract for convenience is in the best interest of the County.

12.3.2.2 If the contracting officer finds that the contract should be terminated for convenience, the contracting officer must provide the contractor with written notice that the contract will be terminated for convenience on the date specified in the notice. The notice must require the contractor to provide the contracting officer with documentation indicating the amount to which the contractor claims it is due as a result of the termination for convenience.

12.3.2.3 The contractor must provide the contracting officer within the time specified in the notice of termination for convenience with documentation substantiating the amount the contractor asserts it is due as a result of the termination for convenience.

12.3.2.4 If the contracting officer and the contractor agree on the amount due the contractor as a result of the termination for convenience, the County and the contractor must enter into a contract modification setting forth the amount due the contractor as a result of the termination for convenience.

12.3.2.5 The County Attorney must approve the issuance of the notice of termination for convenience and any resulting contract modification.

12.3.2.6 If the contractor and the contracting officer cannot agree on the amount due the contractor as a result of the termination for convenience, the contractor must file a timely claim under Section 14.2.

12.3.3 Termination by Mutual Consent

12.3.3.1 The Using Department must provide the contracting officer with documentation justifying termination of a contract by mutual consent.

12.3.3.2 If the contracting officer finds that it is in the best interest of the County to terminate the contract by mutual consent, the contracting officer may enter into a termination agreement.

12.3.3.3 The County Attorney must approve a termination agreement.

13. CLAIMS OUTSIDE A CONTRACT

13.1 Defined

A claim outside a contract is a demand or request for payment from a person who, at the direction of a County employee, has furnished goods, services, or construction to the County outside a contract. This may occur when:

- 13.1.1 goods, services, or construction was accepted without the award of a contract;
- 13.1.2 performance was accepted under a contract without a timely certification of available funds;
- 13.1.3 performance by a contractor was outside the scope of the contract and was accepted; or
- 13.1.4 goods, services, or construction was provided after the expiration of the contract, but otherwise in conformance with its terms and conditions.

13.2 Policy

Claims outside contracts are not encouraged and must be avoided, whenever possible, by the Using Departments. However, a procedure is necessary to provide for fair compensation to a person who has provided the County with a benefit outside a contract. This procedure is discretionary and does not create any rights to payment to the person unless the claim is approved by authorized County officials. This procedure must not be utilized by the Using Departments to circumvent the requirements of these regulations.

13.3 Approval Requirements

- 13.3.1 If circumstances under 13.1.2 exist, the Director may approve a claim outside a contract after determining that sufficient funds have been encumbered to defray the cost of the performance under the contract. Once this determination has been made, the contract is valid and payment may be made, if otherwise due under the contract. The Using Department Head must submit a memorandum to the Director (1) requesting approval; (2) explaining why funds had not been encumbered; and (3) describing what steps the Using Department has taken to avoid a similar claim in the future. A Using Department Head must execute this memorandum.

- 13.3.2 Before any other claim outside a contract is approved, a Using Department must submit the following to the Office of the County Attorney:
 - 13.3.2.1 A statement of all facts demonstrating that the County directed the person to proceed with performance, including the identity of every employee who directed the person to proceed;
 - 13.3.2.2 A statement of all facts demonstrating that the person relied upon the direction of a County employee;
 - 13.3.2.3 An analysis of the work performed and the benefit received, which must include a certification that the claim represents a fair and reasonable value including all facts that support the certification;
 - 13.3.2.4 An explanation of the reason why the goods, services, or construction was not provided under a contract and a statement of actions taken or a plan to assure that this type of claim will not occur in the future;
 - 13.3.2.5 A statement of any additional facts that indicate why the person is entitled to payment of the claim;
 - 13.3.2.6 A written invoice; and
 - 13.3.2.7 A proposed release, contract, or contract modification that makes the performance rendered by the person subject to all applicable mandatory clauses, and releases the County from any further claim.

13.4 Procedures for Approval

- 13.4.1 A Using Department must submit the information required in section 13.3.2 to the County Attorney for review and action.
 - 13.4.1.1 If the claim outside a contract is \$5,000 or less, the County Attorney may approve the claim outside a contract in writing and return it to the Using Department which is responsible for processing the claim outside a contract approval for payment.
 - 13.4.1.2 If the claim outside a contract is in excess of \$5,000, the County Attorney may approve the claim outside a contract subject to approval of the CAO. If the County Attorney approves the claim,

the County Attorney must submit a recommendation for approval to the CAO, in writing, together with documentation received from the Using Department.

13.4.1.3 If the County Attorney rejects a claim outside a contract, the County Attorney must state the reasons for the rejection in writing and return the documentation to the Using Department. The Using Department may resubmit the claim outside a contract to the County Attorney with additional information as requested or other information the Using Department may elect to submit.

13.4.1.4 If the County Attorney requests further information, the Using Department must furnish the requested information as expeditiously as possible.

13.4.2 After receipt of the claim outside a contract together with the County Attorney's approval, the CAO may approve or reject the claim in writing and return all documentation to the Office of the County Attorney. Upon receipt of the copy of the original memorandum (without attachments) from the Using Department, the CAO may take any appropriate action to avoid future claims.

13.4.3 If approved for payment, the Using Department is responsible for processing payment of the claim outside a contract subject to any conditions imposed by the County Attorney or the CAO.

13.5 CAO and County Attorney's Approval Authority

Notwithstanding any provisions of this Section or these regulations, the determination of the validity of the claim outside a contract is made in the sole discretion of the County Attorney and the CAO, as provided in the Montgomery County Code.

14. SOLICITATION PROTESTS; CONTRACT DISPUTES

14.1 Solicitation Protests

14.1.1 Definitions

14.1.1.1 In this section, offeror includes a prospective offeror.

14.1.1.2 Aggrieved means that the offeror who is filing the protest or appeal may be eligible for an award of the contract if the protest is sustained (e.g., a fourth ranked offeror is not aggrieved unless the grounds for a protest, if sustained, would disqualify the top three ranked offerors or would require that the solicitation be reissued).

14.1.2 Protest

Only an offeror who is aggrieved may file a protest. An offeror is aggrieved only if the offeror can demonstrate that should the protest be sustained, the offeror may be eligible for the remedies allowed under section 14.1.3.6(a) or (c).

14.1.2.1 Any offeror who is aggrieved in connection with a formal solicitation must file and deliver a written protest to the Director:

- (a) within 10 days after the Director publicly posts the proposed contract award if the bidder or offeror seeks as a remedy the award of the contract or costs under 11B-36(h) of the Montgomery County Code; and
- (b) before the submission date for bids or proposals if the bidder or offeror seeks as a remedy the cancellation or amendment of the solicitation.

The Director must dismiss any protest not timely received.

14.1.2.2 Each protest must contain the following:

- (a) An identification of the solicitation from the County;
- (b) The protesting offeror's name, address and telephone number;

- (c) A statement supporting that the offeror is aggrieved;
- (d) Specification of all grounds for the protest, including:
 - (1) A submission of detailed facts and all relevant documents;
 - (2) A citation to relevant language in the solicitation, regulations, or law relied upon; and
 - (3) All other matters which the offeror contends supports the protest.
- (e) Factual allegations regarding information not appearing on the face of the solicitation or offer must be supported by affidavit based on personal knowledge.
- (f) A protest filing fee in the amount of \$500.00.
- (g) If bid or proposal preparation costs are sought, the protesting offeror must provide by affidavit based on personal knowledge evidence supporting the costs claimed.

14.1.2.3 If, before filing a timely protest, an aggrieved offeror has requested in connection with the protest public records under the Maryland Public Information Act, the offeror may amend the grounds for the protest within 10 days of the County's making available for inspection records that: (a) must be released under the Maryland Public Information Act at the time of the request for the records; and (b) demonstrate the offeror may have other grounds for the protest than the grounds specified in the protest.

14.1.2.4 After a protest is filed, the Director may give appropriate notice to other known offerors who may be affected by the protest. Other affected offerors may submit written comments or documents regarding the protest. All offerors are required to keep apprized of the current status of solicitations, proposed awards and protests; an offeror may not rely on notice of a protest from the Director. Notice by the Director is discretionary and need not be given. The burden of staying informed about the filing of a protest and the timely submission of comments by affected offerors is on the offerors.

- 14.1.2.5 The Director may hold a conference with all interested parties if the Director believes a conference would contribute to a resolution of the protest.
- 14.1.2.6 The burden of production of all relevant evidence, data and documents and the burden of persuasion to support the protest is on the offeror making the protest.
- 14.1.2.7 After considering the protest based on the record received, the Director must make a determination and finding regarding the protest. The Director's determination and finding are in the nature of a reconsideration. The Director must forward by certified mail the determination and finding to the protesting offeror and other offerors who have participated in the protest.

14.1.3 **Appeal**

- 14.1.3.1 An offeror may appeal to the CRC a protest decision of the Director which adversely affects the offeror within 10 days after the date the decision is mailed. The offeror must be aggrieved to appeal.
- 14.1.3.2 The CRC must review the protest de novo, but the CRC must not consider any grounds except those presented to the Director under 14.1.2.2.
- 14.1.3.3 The appeal must be in writing and must include a copy of the protest and the decision of the Director. In addition, the appeal must contain all grounds for disagreement with the decision of the Director. The appealing offeror is confined to the grounds specified for the appeal and may not raise new grounds for the appeal after the initial appeal is filed with the CRC.
- 14.1.3.4 After the offeror files an appeal, the Director may submit to the CRC a response to the appeal. If the Director submits a response, then the Director must include in the response all documents in support of the response.
- 14.1.3.5 The CRC (with the Director not participating) must review the appeal.
 - (a) If the CRC finds there is no genuine dispute as to a material fact and the appeal can be decided as a matter of law

(which may include lack of aggrieved status or failure to comply with appeal procedures), the CRC must make proposed findings and a recommendation that decide the appeal.

- (b) If the CRC finds there is a genuine dispute as to a material fact and the appeal cannot be decided as a matter of law, it must notify the appealing offeror, the proposed awardee, the Director, and the Using Department and conduct further proceedings. These proceedings may include a hearing. If a hearing officer is designated by the CRC, the hearing officer must conduct the hearing and make proposed findings and a recommendation to the CRC. After the hearing (if any) and based on the record, the CRC may accept, reject, or modify the hearing officer's proposed findings of fact and recommendation, and must, in turn, submit a recommended decision on the appeal to the CAO.
- (c) The CRC must send a copy of the recommended decision to the CAO who may approve, revise, or remand the decision. If the CAO takes no action within five working days, the decision of the CRC becomes the final decision of the CAO.
- (d) The final decision must be mailed to the appealing offeror and other offerors who have participated in the appeal.
- (e) The final decision of the CAO is subject to appeal to the Circuit Court under the Maryland Rules governing administrative appeals.

14.1.3.6 Remedies

- (a) Remedies before an award: If a protest or appeal is sustained before an award, then the solicitation or proposed award must be:
 - (1) canceled; or
 - (2) revised to comply with the law.
- (b) Remedies after an award: If a protest or appeal is sustained after an award, then:

- (1) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (A) the contract may be ratified and affirmed; or
 - (B) the contract may be terminated and the person awarded the contract must be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination; or
- (2) if the person awarded the contract has acted fraudulently or in bad faith, the CRC may make a specific recommendation to the Director to take an action authorized under Section 11B-39(b) of the Montgomery County Code.
- (c) A monetary award in favor of a protesting bidder or offeror is limited to reasonable bid or proposal preparation costs. Bid or proposal preparation costs may be awarded only if:
 - (1) the protesting bidder or offeror should have been awarded the contract; and
 - (2) the award has been made to another.
- (d) The Director or CRC may return the filing fee to the protesting bidder or offeror, if the protest or appeal is sustained.

14.1.4 **Standard of Review of QSC Recommendations**

If the evaluation of the proposals by the QSC is challenged, the Director or, in the case of an appeal, the CRC, must give deference to the judgment of the QSC. The QSC's recommendation must be affirmed where a reasoning mind could arrive at the conclusion reached by the QSC consistent with proper application of applicable procurement laws, regulations, and solicitation requirements.

14.1.5 **Contract Awards**

- 14.1.5.1 Generally, contracts are not awarded until the later of 10 days from the date of posting of the proposed awardee or, in the case of a protest, the final administrative decision has been made by the County.
- 14.1.5.2 The Director may award a contract before the 10 days has elapsed or a final administrative decision made with regard to a protest after making a determination and finding that awarding the contract without delay is necessary to protect the interests of the County. The Director should consider the following:
 - (a) The merits of any protesting offeror's complaint;
 - (b) The need of the government for the procurement which is the subject of the protest;
 - (c) The fluctuations in the market affecting costs;
 - (d) The unwillingness of the proposed awardee to extend its offer; or
 - (e) Other factors affecting the interests of the County.

14.1.6 Solicitation Protest Hearing Procedures; Powers of Hearing Authority

- 14.1.6.1 Hearings are held at a time and place designated in a written notice to the parties to the appeal. The hearing is on the record and must be open to the public, unless otherwise ordered by the hearing authority or as provided by law.
- 14.1.6.2 The hearing authority must arrange for a verbatim recordation of all testimony. The Using Department must pay the cost of the recordation. A party requesting a transcript must bear the expense of the transcript. The hearing authority must maintain a record of the proceedings which consist of the verbatim recordation or transcript, exhibits, and the hearing authority's proposed findings of fact and recommendations.
- 14.1.6.3 A hearing authority must not consider an ex-parte communication except as provided in the Montgomery County Public Ethics Law.
- 14.1.6.4 Each party may:

- (a) be represented by counsel authorized to practice law in Maryland;
- (b) file motions;
- (c) present evidence, including testimony and exhibits;
- (d) cross-examine witnesses; and
- (e) argue in support of its respective position.

14.1.6.5 Subject to the direction of the hearing authority, proceedings are informal. Although the hearing authority has full discretion to proceed in an orderly fashion, the following is the usual order for presentation of the appeal:

- (a) Opening statements (appealing offeror first, proposed awardee second, Director last);
- (b) Presentation of witnesses and documents (appealing offeror first, proposed awardee second, Director last); and
- (c) Closing argument (appealing offeror first, proposed awardee second, Director last).

14.1.6.6 The hearing authority may establish requirements with respect to discovery and other pre-hearing submissions and procedures.

14.1.6.7 The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence that is reliable in nature. The hearing authority must give effect to the rules of privilege recognized by law. The hearing authority may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence, or admit evidence at its own request. The hearing authority may question witnesses on any point.

14.1.6.8 The hearing authority may:

- (a) set any reasonable schedule for the hearing, motions, and presentation of evidence;

- (b) accept stipulations;
- (c) require the swearing of witnesses;
- (d) take official notice of commonly cognizable facts;
- (e) rule on motions and objections;
- (f) subpoena and examine witnesses;
- (g) accept exhibits into the record;
- (h) administer oaths and affirmations;
- (i) grant or deny a request for a subpoena, including a subpoena duces tecum;
- (j) impose sanctions for failing to provide required discovery;
- (k) for good cause shown, keep the record open for receipt of additional evidence or submissions by the parties after the close of the hearing; and
- (l) make any other ruling necessary to promote fairness or efficiency in the hearing process, including a recommended summary disposition of the appeal.

14.1.6.9 The burden of proof and the burden of persuasion with respect to the appeal is on the appealing offeror.

14.1.6.10 The hearing officer must prepare and submit to the CRC a written report containing proposed findings of fact and recommendations based on the record. A copy of the report must be forwarded to all parties.

14.1.6.11 The CRC may hear separate appeals from different offerors on the same proposed contract award in the same hearing or in separate hearings.

14.2 Contract Disputes

14.2.1 Definitions

14.2.1.1 In this section claim means:

- (a) a demand by a contractor that seeks the payment of money, an adjustment of time, an adjustment or interpretation of a contract provision, or other relief arising under or relating to a contract; or
- (b) a disagreement arising from a decision by the Director regarding a contract termination under Section 12.

14.2.1.2 In this section a dispute means an unresolved claim.

14.2.2 **General**

- 14.2.2.1
- (a) A contractor must use the process set out in this section to resolve a contract claim or dispute.
 - (b) Except with respect to a claim arising from a decision of the Director terminating a contract, a contractor must notify in writing the contract administrator of the claim, and must attempt to resolve the claim with the contract administrator prior to filing a dispute with the Director. A contractor must file a dispute with the Director within 30 days of the event giving rise to the claim (unless the contract provides otherwise) whether or not the contract administrator has responded to the written notice of claim or resolved the claim. The contractor waives any dispute not timely filed. The Director and the CAO must dismiss a dispute that is not timely filed. If the dispute arises from a decision of the Director terminating a contract, the Director must treat the dispute as a request for reconsideration.

14.2.2.2 When first filing a dispute, a contractor must provide to the Director the following:

- (a) The name and identification number of the contract with the County;
- (b) The name, address and telephone number of the contractor;
- (c) All grounds supporting the contractor's requested relief, including:

- (1) The detailed facts and all relevant documents;
 - (2) The relevant language in the contract, regulations, or law relied upon;
 - (3) All other matters which the contractor contends supports the claim; and
 - (4) The relief requested.
- (d) The factual allegations contained in the dispute must be supported by one or more affidavits based on personal knowledge.
- 14.2.2.3 (a) The Director, after consulting with the Using Department, must decide a dispute within 45 days after receiving the dispute unless the contractor agrees to extend the time for a decision.
- (b) If the Director denies a dispute, in whole or in part, the contractor may file a contract dispute appeal with the CAO. The contractor must file a dispute appeal within 30 days after receiving the Director's decision, or if no decision is rendered by the Director within 45 days, within 75 days after submitting the dispute.
- (c) Unless the Director and the contractor agree, a dispute may not be resolved by mediation or binding arbitration.
- 14.2.2.4 The CAO may hold a conference with all interested parties if the CAO believes a conference would contribute to a resolution of the dispute.
- 14.2.2.5 The contractor bears the burden of proof and the burden of persuasion to support the relief requested.
- 14.2.2.6 Pending final resolution of a dispute, the contractor must proceed diligently with contract performance unless the County has terminated the contract.
- 14.2.2.7 The CAO may consolidate a contractor's disputes if the disputes have common questions of law or fact. The time limits in

Section 14.2 for the last dispute filed apply to the consolidated dispute.

- 14.2.2.8 The CAO or the Director may order a contractor that is not a party to the appeal or the contract under which the dispute has been filed to become a party to the proceeding if the dispute on appeal may be based, in whole or in part, on the performance of the other contractor. The Director or CAO may order the other contractor to compensate another party to the dispute appeal, including the County, for damages incurred as a result of the other contractor's failure to perform a contract obligation.
- 14.2.2.9 Upon receipt of the contract dispute appeal, the CAO must review the dispute de novo, but the CAO must not consider any grounds except those presented to the Director under 14.2.2.2.
 - (a) The contractor must file a dispute appeal with the CAO. The dispute appeal must identify the relief sought by the contractor and all grounds and materials supporting the contractor's request for relief. The contractor must provide a copy of the dispute appeal to the Director and the County Attorney.
 - (1) At the time of filing a dispute appeal involving \$10,000 or more with the CAO, the appealing contractor must provide to the other parties to the dispute a written notice which contains:
 - (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information regarding facts concerning the dispute;
 - (B) a computation of each category of damages or other specific relief sought; and
 - (C) the name, address, and telephone number of each individual from whom the contractor expects to obtain expert testimony. The notice must include a written statement that contains:

- (i) a complete statement of each opinion to be expressed;
 - (ii) the basis and reason for each opinion;
 - (iii) the data or other information considered by the expert in forming each opinion;
 - (iv) the qualifications of the expert, including a list of all publications authored by the expert; and
 - (v) a list of each case in which the expert has testified as an expert within the preceding 4 years.
 - (D) the parties have a continuing obligation to promptly supplement any change in information contained in the written notice required in this subsection.
- (2) The other parties must provide the notice required under paragraph (1) to the appealing contractor and any other party:
- (A) within 90 days after being served with the notice required under paragraph (1) if the dispute involves more than \$100,000; or
 - (B) within 60 days after being served with the notice required under paragraph (1) if the dispute involves \$100,000 or less.
- (b) The Director must file with the CAO a response to the dispute appeal within 15 days after the dispute is filed. The Director must include a complete copy of the contract in the response unless the contractor has provided it in the dispute appeal. The Director must send a copy of the response to the contractor.
- (c) The CAO may require the contractor and the Director to submit additional information.

- (d) If the CAO finds, based on the record, that the Contractor failed to comply with the requirements of section 14.2.2, the CAO must summarily deny the appeal within 30 days after receiving the appeal. If the CAO finds, based on the record, that the contractor complied with the requirements of section 14.2.2, and there are no genuine disputes of material fact, the CAO must decide the appeal without a hearing within 30 days after receiving the appeal. The CAO must state in writing the reasons that support the decision.
- (e) If the CAO determines that the appeal cannot be decided under section (d) above, the CAO must order a hearing. The CAO may designate a hearing officer to conduct the hearing, and may limit the issues to be heard. If a hearing officer is designated by the CAO, the hearing officer must conduct the hearing in accordance with section 14.2.4 and make proposed findings of fact and recommendation to the CAO. The hearing must be completed in conformance with the time requirements imposed by Chapter 11B of the Code. After the hearing and based on the record, the CAO must make a written decision on the appeal, including proposed findings of fact and recommendation within 30 days after receiving the hearing officer's report. The CAO may adopt, modify or reject the findings of fact and recommendation of the hearing officer's report.
- (f) The final decision of the CAO is subject to judicial review under 11B-35D of the Code.

14.2.2.10 Unless the CAO and the contractor agree, a contract dispute appeal may not be resolved by mediation or binding arbitration.

14.2.3 **Contract Dispute Procedures**

14.2.3.1 **Discovery**

Whether or not a hearing has been ordered, each party to an appeal in a contract dispute is entitled to obtain the following discovery regarding any matter, not privileged, which is relevant to the appeal:

- (a) Any time after a contract dispute appeal has been filed with the CAO, a party may serve another party with a request for production, inspection, and copying of documents or any tangible things. Within 30 calendar days after service, the party served must respond stating that inspection and copying will be permitted or stating the basis for any objection.
- (b) If the value of the dispute exceeds \$250,000, any party may take depositions, upon oral examination, before an officer authorized to administer oaths at a place of examination, for the purpose of discovery or for use as evidence. The party desiring to take a deposition must serve a notice of deposition upon oral examination at least 7 calendar days before the date of the deposition. A party must not take more than 5 depositions without leave of the hearing authority or agreement of the parties.

14.2.3.2 **Pre-Hearing Report**

Seven days prior to the commencement of the hearing, the contractor and the County must submit a pre-hearing report to the hearing authority, with a copy to the other parties. Each pre-hearing report must:

- (a) Explain each claim and defense relied upon by the party;
- (b) List all issues not in dispute, facts stipulated, and facts to which the other party is requesting stipulation;
- (c) List each witness (except for rebuttal witnesses) to be called by the party and a summary of the facts to which the witness is expected to testify;
- (d) List each expert witness to be called and attach a copy of any report prepared by the expert witness. Unless contained in the expert's report, the party must provide:
 - (1) a complete statement of each opinion to be expressed;
 - (2) the basis and reason for each opinion;

- (3) the data or other information considered by the expert in forming each opinion;
- (4) the qualifications of the expert, including a list of all publications authored by the expert; and
- (5) a list of each case in which the expert has testified as an expert within the preceding 4 years.

and;

- (e) List each exhibit to be introduced by the party.

14.2.4 Hearing Procedures; Powers of Hearing Authority

- 14.2.4.1 The CAO may designate a hearing officer to conduct a hearing and make proposed findings of fact and recommendations to the CAO. If the CAO designates a hearing officer, the hearing officer has all the authority granted in section 14.2.4 granted to the hearing authority except the authority to make a final agency decision.
- 14.2.4.2 The hearing authority must provide written notice to the parties designating a time and place for the hearing. The hearing must be on the record and be open to the public, unless otherwise ordered by the hearing authority or as provided by law.
- 14.2.4.3 The hearing authority must arrange for a verbatim recordation of all testimony. The Using Department must pay the cost of the recordation. A party requesting a transcript must bear the expense of the transcript. The hearing authority must maintain a record of the proceedings which consists of the verbatim recordation or transcript exhibits, and the hearing authority's proposed findings of fact and recommendations.
- 14.2.4.4 A hearing authority must not consider an ex parte communication except as provided in the Montgomery County Public Ethics Law.
- 14.2.4.5 Each party may:
 - (a) be represented by counsel authorized to practice law in Maryland;

- (b) file motions;
- (c) present evidence, including testimony exhibits;
- (d) cross-examine witnesses; and
- (e) argue in support of its respective position.

14.2.4.6 Subject to the direction of the hearing authority, proceedings are informal. Although the hearing authority has full discretion to proceed in an orderly fashion, the following is the usual order for presentation of the appeal:

- (a) Opening statements (appealing contractor first, County last);
- (b) Presentation of witnesses and documents (appealing contractor first, County last); and
- (c) Closing argument (appealing contractor first, County last).

14.2.4.7 The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence that is reliable in nature. The hearing authority must give effect to the rules of privilege recognized by law. The hearing authority may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence, or admit evidence at its own request. The hearing authority may question witnesses on any point.

14.2.4.8 The hearing authority may:

- (a) set any reasonable schedule for the hearing, motions, and presentation of evidence;
- (b) accept stipulations;
- (c) require the swearing of witnesses;
- (d) take official notice of commonly cognizable facts;
- (e) rule on motions and objections;

- (f) subpoena and examine witnesses;
- (g) accept exhibits into the record;
- (h) administer oaths and affirmations;
- (i) grant or deny a request for a subpoena, including a subpoena duces tecum;
- (j) impose sanctions for failing to provide required discovery;
- (k) for good cause shown, keep the record open for receipt of additional evidence or submissions by the parties after the close of the hearing; and
- (l) make any other ruling necessary to promote fairness or efficiency in the hearing process, including a recommended summary disposition of the contract dispute appeal.

14.2.4.9 The burden of proof and the burden of persuasion with respect to the appeal is on the appealing contractor.

14.2.4.10 The hearing officer must prepare and submit to the CAO, a written report containing proposed findings of fact and recommendations based on the record. A copy of the report must be forwarded to all parties.

14.2.5 **Alternative Dispute Resolution**

14.2.5.1 If an election to mediate the dispute has been made, the parties must enter into a mediation agreement which:

- (a) states how a mutually acceptable mediator will be chosen;
- (b) defines the consequences for failing to resolve the dispute through mediation; and
- (c) provides that the cost of the mediation services will be borne equally by the parties.

14.2.5.2 (a) If an election to submit the dispute to binding arbitration is made, the parties must enter into an agreement which:

- (1) states how a mutually acceptable arbitrator will be selected. The parties may agree to use an arbitration service such as the American Arbitration Association or the Federal Mediation and Conciliation Service. Unless the parties agree otherwise, or the arbitration service selected provides for another method of selection, the parties must alternatively strike the proposed arbitrators until one remains.
 - (2) provides that the cost of the arbitration services will be borne equally by the parties; and
 - (3) provides for mutual discovery and hearing procedures.
- (b) An arbitrator has no authority to amend, add to, or subtract from applicable State and Montgomery County law, Montgomery County Procurement Regulations, and the terms of the contract under which the dispute arises. The arbitrator must make an award that is consistent with applicable law, regulations, and the terms of the contract.
 - (c) In arbitration, the contractor bears the burden of proof and the burden of persuasion to support the relief requested.
 - (d) Pending final resolution of the dispute by arbitration, the contractor must proceed diligently with contractor performance unless the County has terminated the contract.

15. CONTRACT REVIEW COMMITTEE (CRC)

15.1 Purpose

The CRC is established for the purpose of reviewing and evaluating certain procurement actions, recommending resolution of solicitation protest appeals, advising the CAO and Director on matters pertaining to procurement in Montgomery County, and performing such other responsibilities as provided in these regulations or assigned by the CAO.

15.2 Composition

15.2.1 Voting Members. The CRC is composed of the following voting members.

15.2.1.1 The Chair or an alternate designated by the CAO.

15.2.1.2 The Director or the Director's designee.

15.2.1.3 The Director of the Office of Management and Budget or that Director's designee.

15.2.1.4 The Director of the Staff of the County Council or that Director's designee, when a County Council procurement action is considered.

15.2.1.5 If the CRC is deciding a solicitation protest appeal, the CAO must designate an impartial County employee as a member in place of the Director. In all other cases the County Attorney or designee becomes a voting member in the case of a disqualification or absence of a voting member.

15.2.2 Advisory Members (non-voting).

15.2.2.1 The County Attorney or designee is a non-voting member.

15.2.2.2 The CAO may designate a Using Department representative as a non-voting member.

15.3 Authority

15.3.1 The CRC derives its authority from these regulations and the CAO.

15.3.2 The CRC may request any information from Using Departments that it deems necessary in connection with the exercise of its authority and responsibilities. The Director, acting on behalf of the CRC, may request Using Departments to furnish certain documentation or take certain actions either for submittal to the CRC for review or in order to implement CRC decisions. Using Departments should respond to requests as expeditiously as possible.

15.3.3 The Director must prepare the agenda of the CRC, subject to the direction of the Chair, and may issue guidelines to the Using Departments with respect to required submissions, time deadlines and other matters pertaining to the

orderly conduct of the agenda for the CRC. This may include coordinating Using Department representatives' attendance at CRC meetings.

- 15.3.4 The CRC may condition its approval of procurement actions. The conditions must be satisfied before the procurement may be consummated.
- 15.3.5 The CRC may hold hearings, call witnesses, receive documentation and correspondence and conduct investigations.

15.4 **Minutes and Records**

- 15.4.1 The Director is responsible for preparing meeting minutes in accordance with the requirements of the State Open Meetings Act.
- 15.4.2 The minutes reflect voting and actions on each agenda item..
- 15.4.3 The Chair must maintain CRC solicitation protest appeal records until the dispute is finally resolved. The Director maintains all other records. After the solicitation protest appeal is finally resolved, the Chair must transmit the record to the Director.

15.5 **Duties and Responsibilities**

- 15.5.1 The CRC has the following responsibilities.
 - 15.5.1.1 Approving sole source procurements valued above the threshold for an IFB or RFP.
 - 15.5.1.2 Approving all change orders or amendments to a contract valued above the threshold for an IFB or RFP, unless the Director determines that the change in compensation results from a mechanical application of an established cost indexing provision or other contract option which pre-determines price.
 - 15.5.1.3 **Approving a contract extension** beyond **the** original term, except:
 - (a) An extension authorized in the original contract, or
 - (b) A single extension of the original term by 12 months or less.

- 15.5.1.4 Considering procurement matters referred to the CRC by the CAO, the County Attorney, the Director or a Using Department Head.
- 15.5.1.5 Recommending resolution of solicitation protest appeals.
- 15.1.5.6 Considering other procurement matters as provided in these regulations.
- 15.5.2 The CRC may undertake special investigations or studies and render reports as directed by the CAO.
- 15.5.3 The CRC may coordinate its review of proposed procurement actions with the budgets, programs, and procurement actions of the Using Departments.

16. ETHICS

All public and private participants in the procurement process are subject to County ethics laws under Chapters 11B and 19A of the Montgomery County Code and the applicable regulations for standards of conduct required in contracting. Questions regarding ethical issues should be directed to the Montgomery County Ethics Commission, the Office of the County Attorney, or the Director.

17. GRANTS

17.1 General Authority

The Director, upon a recommendation from the Using Department, may enter into a non-competitive contract if the person was named or designated in:

17.1.1 a grant accepted by the County; or

17.1.2 a resolution or appropriation approved by the County Council.

17.2 Authority of the Director

The Director, upon a recommendation from a Using Department, may determine that the contract serves a public purpose and enter into the contract.

17.3 Other requirements

17.3.1 Contracts entered into under the grant authority contained in Chapter 11B of the Code must meet all requirements specified by the County Attorney and the Director. The contract must be in a form approved by the County Attorney. The contract should include specifications or conditions of performance under the contract, identification of payment schedules, and other mandatory provisions usually expected in County contracts.

17.3.2 A Using Department, prior to County Council approval of a grant award, must certify to the County Council, the Office of Management and Budget, and the Director that:

17.3.2.1 the proposed grantee would qualify as a responsible offeror under Section 6.3;

17.3.2.2 the grant amount is fair and reasonable after making a price analysis required under Section 10.1.1; and

17.3.2.3 the services, goods, and construction funded by the grant award are in the public interest.

18. DEBARMENT AND SUSPENSION

18.1 Debarment

- 18.1.1 After consulting with the Using Department and the County Attorney, the Director may debar a person from consideration for award of contracts, for a length of time to be determined by the Director. The length of time should not be less than the time which would be expected to include one or more solicitations for the type of work being provided by the debarred person. The debarment time imposed by the Director is not limited by the debarment time imposed by another public entity.
- 18.1.2 The Director must maintain a list of debarred persons and corresponding dates of debarment.
- 18.1.3 The Director may debar a person for any of the following reasons:
 - 18.1.3.1 Conviction for commission of a criminal offense incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of the contract or subcontract;
 - 18.1.3.2 Conviction of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, kickbacks or any other offense indicating a lack of business integrity;
 - 18.1.3.3 Conviction under state or federal antitrust statutes arising out of the submission of bids or proposals;
 - 18.1.3.4 Violation of County contract provisions of a character which is regarded by the Director to be so serious as to justify debarment action, which may include:
 - (a) deliberate failure without good cause to perform under the specifications or within the time limits provided in the contract; or
 - (b) a record of failure to perform or of unsatisfactory performance under the provisions of one or more contracts; however, failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor are not a basis for debarment;

- 18.1.3.5 violation of the ethical standards set forth in Chapter 11B or Chapter 19A of the Code; or
- 18.1.3.6 any other serious cause the Director determines to be so compelling as to affect the competency or integrity of a potential contractor, including debarment by another public entity.
- 18.1.4 The Director must send a notice of proposed debarment to the person whom the Director proposes to debar. The notice must inform the person of:
 - 18.1.4.1 the factual basis constituting probable cause for debarment; and
 - 18.1.4.2 the right, within 10 days, to provide written reasons why the person should not be debarred and, if desired, to request a hearing.
- 18.1.5 After reviewing the record, the Director determines whether there are disputes of material fact.
 - 18.1.5.1 If the Director determines there are no genuine disputes of material facts, the Director must issue a decision on the debarment.
 - 18.1.5.2 If the Director determines there are genuine disputes of material facts, the Director must conduct a hearing and may designate a hearing officer to take evidence and to make proposed findings to the Director.
- 18.1.6. The Director must send a copy of a recommended determination and finding to the CAO. The CAO may approve, revise, or remand the Director's recommended decision based on the record. If the CAO takes no action within 5 working days after receiving the Director's decision, the decision of the Director becomes the final decision of the CAO.
- 18.1.7 The final decision must be mailed to the person who was subject to the debarment proceeding.
- 18.1.8 A determination by the Director or the CAO not to debar a person does not preclude the Director from finding the person not responsible in the context of a specific solicitation.

18.2 Suspension

- 18.2.1 If the Director initiates debarment proceedings, the Director may suspend a person from consideration for award of contracts. The suspension may not exceed 6 months.
- 18.2.2 The Director must send a notice of proposed suspension to the person whom the Director proposes to suspend. The notice must inform the person of the right to provide written reasons why the person should not be suspended.
- 18.2.3 A person who receives a notice of proposed suspension must provide written reasons opposing the suspension within 10 days after the Director issues the notice of proposed suspension.
- 18.2.4 After reviewing any material supplied by the person, the Director must make a determination and finding regarding the suspension.
- 18.2.5 The Director must send a copy of the recommended determination and finding to the CAO who may approve, revise, or remand the decision. If the CAO takes no action within 5 working days, the decision of the Director becomes the final decision of the CAO.
- 18.2.6 The final decision must be mailed to the person who was the subject of the suspension proceedings.

18.3 Hearing Procedures

18.3.1 Discovery

- 18.3.1.1 Each party to a debarment proceeding is entitled to obtain the following discovery regarding any matter, not privileged, which is relevant to the debarment proceeding:
- 18.3.1.2 Any time after the Director decides to conduct a hearing in the debarment proceeding, a party may serve another party with a request for production, inspection, and copying of documents or any tangible things. Within 30 calendar days after service, the party served must respond stating that inspection and copying will be permitted or stating the basis for any objection.
- 18.3.1.3 Any party may take depositions, upon oral examination, before an officer authorized to administer oaths at a place of examination, for the purpose of discovery or for use as evidence. The party desiring to take a deposition must serve a notice of deposition upon oral examination at least 7 days before the date

of the deposition. A party must not take more than 5 depositions without leave of the hearing authority or agreement of the parties.

18.3.2 Pre-Hearing Report

Seven days prior to the commencement of the hearing, the parties to the debarment proceeding must submit a pre-hearing report to the hearing authority, with a copy to the other parties. Each pre-hearing report must:

- 18.3.2.1 Explain each ground or defense relied upon by the party;
- 18.3.2.2 List all issues not in dispute, facts stipulated, and facts to which the other party is requesting stipulation;
- 18.3.2.3 List each witness (except for rebuttal witnesses) to be called by the party and a summary of the facts to which the witness is expected to testify;
- 18.3.2.4 List each expert witness to be called and attach a copy of any report prepared by the expert witness. Unless contained in the expert's report, the party must provide:
 - (a) a complete statement of each opinion to be expressed;
 - (b) the basis and reason for each opinion;
 - (c) the data or other information considered by the expert in forming each opinion;
 - (d) the qualifications of the expert, including a list of all publications authored by the expert; and
 - (e) a list of each case in which the expert has testified as an expert within the preceding 4 years;

and

- 18.3.2.5 List each exhibit to be introduced by the party.

18.3.3 Hearing Procedures; Powers of Hearing Authority

- 18.3.3.1 If the Director designates a hearing officer, the hearing officer has all the authority granted in these regulations except to make a final agency decision.
- 18.3.3.2 Hearings are held at a time and place designated by the hearing authority in a written notice to the parties to the debarment proceeding. The hearing authority must provide written notice to the parties designating a time and place for the hearing. The hearing must be on the record and be open to the public, unless otherwise ordered by the hearing authority or as provided by law.
- 18.3.3.3 The hearing authority must arrange for a verbatim recordation of all testimony. The Director must pay for the recordation. A party requesting a transcript must bear the expense of the transcript. The hearing authority must maintain a record of the proceedings which consists of the verbatim recordation or transcript, exhibits, and the hearing authority's proposed findings of fact and recommendations.
- 18.3.3.4 A hearing authority must not consider an ex parte communication except as provided in the Montgomery County Public Ethics Law.
- 18.3.3.5 Each party may:
 - (a) be represented by counsel authorized to practice law in Maryland;
 - (b) file motions;
 - (c) present evidence, including testimony and exhibits;
 - (d) cross-examine witnesses; and
 - (e) argue in support of its respective position.
- 18.3.3.6 Subject to the direction of the hearing authority, proceedings are informal. Although the hearing authority has full discretion to proceed in an orderly fashion, the following is the usual order for presentation of the debarment proceeding:
 - (a) Opening statements (County first, person subject to debarment last);

- (b) Presentation of witnesses and documents (County first, person subject to debarment last); and
 - (c) Closing argument (County first, person subject to debarment last).
- 18.3.3.7 The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence that is reliable in nature. The hearing authority must give effect to the rules of privilege recognized by law. The hearing authority may exclude incompetent, unreliable, irrelevant, or unduly repetitious evidence, or admit evidence at its own request. The hearing authority may question witnesses on any point.
- 18.3.3.8 The hearing authority may:
 - (a) set any reasonable schedule for the hearing, motions, and presentation of evidence;
 - (b) accept stipulations;
 - (c) require the swearing of witnesses;
 - (d) take official notice of commonly cognizable facts;
 - (e) rule on motions;
 - (f) subpoena and examine witnesses;
 - (g) accept exhibits into the record;
 - (h) administer oaths and affirmations;
 - (i) grant or deny a request for a subpoena, including a subpoena duces tecum;
 - (j) impose sanctions for failing to provide required discovery;
 - (h) for good cause shown, keep the record open for receipt of additional evidence or submissions by the parties after the close of the hearing; and

- (i) make any other ruling necessary to promote fairness or efficiency in the hearing process, including a recommended summary disposition of the debarment proceeding.

18.3.3.9 The burden of proof and the burden of persuasion with respect to the debarment proceeding is on the County.

18.3.3.10 The Director must prepare and submit to the CAO a written report containing proposed findings of fact and recommendations based on the record. A copy of the report must be forwarded to all parties.

Approved As To Form And Legality
Office of the County Attorney

By: _____

Douglas M. Duncan, County Executive

Date: _____